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No. 7557

U.S. SUPREME COURT

October Term, 1956

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA, CITY OF
PHILADELPHIA, RICHARDSON DILWORTH,
MAYOR OF THE CITY OF PHILADELPHIA, PHILA-
DELPHIA COMMISSION ON HUMAN RELATIONS,
WILLIAM ASHE FOUST AND ROBERT FELDER,

Appellants,

THE BOARD OF DIRECTORS OF CITY TRUSTS OF THE
CITY OF PHILADELPHIA,

Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DENY THE APPEAL and BRIEF IN
OPPOSITION TO PETITION FOR WRIT
OF HABEAS CORPUS

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TABLE OF CONTENTS OF BRIEF.

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
1. The Background	8
2. This Court Has No Jurisdiction, Either by Appeal or Certiorari, Because the Relief Requested Will Not Be Affected by a Decision on the Federal Question Pre- sented	13
3. This Court Has No Jurisdiction by Way of Appeal, No State Statute Having Been Drawn in Question as Being Repugnant to the Fourteenth Amendment	15
4. Certiorari Should Be Denied Because the Supreme Court of Pennsylvania Did Not Decide a Federal Question of Substance	21
5. The Federal Question Was Correctly Decided	25
CONCLUSION	28

TABLE OF CASES CITED.

	Page
American Surety Co. v. Baldwin, 287 U. S. 156 (1932)	17
Atchison, Topeka & S. F. R. Co. v. Public Utilities Commission, 346 U. S. 346 (1953)	19
Baltimore City v. Dawson, 350 U. S. 877 (1955)	25
Barrows v. Jackson, 346 U. S. 249 (1953)	26
Brown v. Board of Education of Topeka, 349 U. S. 483 (1954)	24, 25
Buchanan v. Warley, 245 U. S. 60 (1917)	25
California v. San Pablo and Tulare R. R. Co., 149 U. S. 308 (1893)	13
Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U. S. 182 (1945)	18, 19
Charlotte Park and Recreation Commission v. Barringer, 242 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied sub nom. Leeper v. Charlotte Park and Recreation Commission, 350 U. S. 983 (1956)	26
Citizens National Bank of Cincinnati v. Durr, 257 U. S. 99 (1921)	18
Corkran Oil and Development Co. v. Arnaudet, 199 U. S. 182 (1905)	18
Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282 (1921)	19
Department of Conservation and Development v. Tate, 231 F. 2d 615 (4th Cir., 1956), cert. denied, 352 U. S. 838	25
Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d 541 (1949), cert. denied, 339 U. S. 981 (1950)	27
Forbes v. State Council of Virginia, 216 U. S. 396 (1910)	18
Girard v. Philadelphia, 74 U. S. (7 Wall.) 1 (1869)	10, 14
Godchaux Co. v. Estopinal, 251 U. S. 179 (1919)	17
In re Groban, United States Supreme Court, February 25, 1957	27
Hamilton v. Regents of the University of California, 293 U. S. 245 (1934)	19

TABLE OF CASES CITED (Continued).

	Page
Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203 (1948)	19, 20
Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1 (1920)	18
Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va., 1948)	25
Loeber v. Schroeder, 149 U. S. 580 (1893)	18
Marsh v. Alabama, 326 U. S. 501 (1946)	26
Muir v. Louisville Park Theatrical Ass'n, 347 U. S. 971 (1954)	25
Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md., 1948)	27
Philadelphia v. Fox, 64 Pa. 169 (1870)	9, 10, 11, 16, 21, 22
Radio Station WOW v. Johnson, 326 U. S. 120 (1945)	17
Reuben Quick Bear v. Leupp, 210 U. S. 50 (1908)	27
Rudder v. United States, 226 F. 2d 51 (D. C. Cir., 1955)	25
St. Louis and San Francisco R. Co. v. Shepherd, 240 U. S. 240 (1916)	18
Shelley v. Kraemer, 334 U. S. 1 (1948)	13, 14, 26
Steele v. Louisville & Nashville R. Co., 323 U. S. 192 (1944) ..	26
Terry v. Adams, 345 U. S. 461 (1953)	26
Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210 (1944)	26
Valle v. Stengel, 176 F. 2d 697 (3d Cir., 1949)	26
Vidal v. The Mayor, Aldermen and Citizens of Philadelphia, 43 U. S. (2 How.) 127 (1844)	10, 11, 12, 14, 22
Wall v. Chesapeake & Ohio Ry. Co., 256 U. S. 125 (1921)	17
Waters-Pierce Oil Co. v. Texas (No. 2), 212 U. S. 112 (1909)	18
Wilson v. Board of Directors of City Trusts, 324 Pa. 545 (1936)	21
Zorach v. Clauson, 343 U. S. 306 (1952)	27

TABLE OF STATUTES AND AUTHORITIES CITED.

Pennsylvania Statutes.

	Page
Philadelphia Charter of 1789	10, 12
Acts of March 24 and April 4, 1832, P. L. 176, 275	11
Act of 1847 [February 27, P. L. 178]	11
Act of 1853 [April 20, P. L. 624]	11
Consolidation Act of 1854 (Act of February 2, P. L. 21, 53 Purdon's Stat. § 6361 et seq.)	10
Act of June 30, 1869, P. L. 1276, 53 Purdon's Stat. § 6481 et seq. 3, 5, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23	23
Act of June 8, 1881, P. L. 76	24
Public Contracts Act (Act of May 1, 1933, P. L. 103, art. VIII, § 808, as amended, 53 Purdon's Stat. § 19093-808)	24
Urban Redevelopment Act (Act of May 24, 1945, P. L. 991, § 11, 35 Purdon's Stat. § 1711(a)(8))	24
Act of March 10, 1949, P. L. 30, art. XIII, § 1310, as amended, 24 Purdon's Stat. § 13-1310	24
Pennsylvania Fair Employment Practice Act (Act of October 27, 1955, P. L. 744, 43 Purdon's Stat. § 951 et seq.	24

Other Authorities.

Revised Rules of the Supreme Court of the United States:	
Rule 16	1
Rule 19(1)(a)	21
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 260, p. 467 (1951)	13
Supreme Court of Pennsylvania, Rule 69	17
28 U. S. C. A. § 1257(2)	1, 19, 20
28 U. S. C. A. § 1257(3)	20
28 U. S. C. A. § 2103	1
42 U. S. C. A. §§ 1981-1983, 1985	26
U. S. Constitution:	
First Amendment	28
Fourteenth Amendment 3, 5, 15, 16, 23, 25, 28	28

TABLE OF CONTENTS OF APPENDIX.

	Page
APPENDIX :	
APPENDIX A: Will of Stephen Girard	1a
APPENDIX B: Pennsylvania Act of March 11, 1789, 2 Smith Laws 462, §2, 53 Purdon's Stat. § 6362	33a
APPENDIX C: Pennsylvania Act of March 24, 1832, P. L. 176 (1831-1832 Volume), 53 Purdon's Stat. § 7411, § 7433, § 6791	34a

2

IN THE
Supreme Court of the United States.

October Term, 1956.

No. 769.

COMMONWEALTH OF PENNSYLVANIA, CITY OF
PHILADELPHIA, RICHARDSON DILWORTH,
MAYOR OF THE CITY OF PHILADELPHIA,
PHILADELPHIA COMMISSION ON HUMAN RE-
LATIONS, WILLIAM ASHE FOUST AND ROBERT
FELDER,

Appellants,

v.

THE BOARD OF DIRECTORS OF CITY TRUSTS OF
THE CITY OF PHILADELPHIA,

Appellee.

**MOTION TO DISMISS THE APPEAL AND BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF CER-
TIORARI.**

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment and decree of the Supreme Court of Pennsylvania be dismissed on the ground that the judgment below cannot be appealed directly to the Supreme Court of the United States under 28 U. S. C. A. § 1257(2), and on the further ground that no substantial federal question is presented. Since this Court is required by 28 U. S. C. A. § 2103 to treat the appeal as a petition for certiorari, appellee requests the Court to deny the peti-

2

2 Motion to Dismiss Appeal and Brief/Contra Petition

tion on the ground that there is no basis for jurisdiction, and that the case does not present a substantial federal question.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania (J. S. 25) ¹ is reported as *Girard Will Case*, 386 Pa. 548, 127 A. 2d 287 (1956). The opinions of the Orphans' Court of Philadelphia County (R. 119a, 170a) ² are reported as *Girard Estate*, 4 Pa. D. & C. 2d 671 (1955), and 4 Pa. D. & C. 2d 708 (1956).

Jurisdiction.

The Supreme Court of Pennsylvania held that to deny admission of appellants Foust and Felder to Girard College did not violate the Fourteenth Amendment, since they are not "poor white male orphans, between the ages of six and ten years" as required by Stephen Girard's will.

That court did not decide, as appellants say it did (J. S. 2), or even state that the Board of Directors of City Trusts was "acting pursuant to the Act of June 30, 1869". There has been no decision on the validity or invalidity of that statute or any other statute. Accordingly this Court does not have jurisdiction of this case by appeal.

Nor does this Court have jurisdiction by way of certiorari since the state courts have held that under Pennsylvania law the relief requested by appellants cannot be granted, irrespective of the ultimate decision on the federal constitutional question.

Statute Involved.

This proceeding does not involve any statute whatever. The statute which appellants contend was drawn in

(1) "J. S." refers to appellants' Jurisdictional Statement.

(2) "R" refers to the printed record filed with the Supreme Court of Pennsylvania and certified to this Court.

question as repugnant to the Fourteenth Amendment and allegedly upheld by the Supreme Court of Pennsylvania is the Act of June 30, 1869, P. L. 1276, 53 Purdon's Stat. § 6481 *et seq.*, printed in Appendix B of appellants' Jurisdictional Statement (J. S. 112).

Questions Presented.

1. Where the state courts have held that irrespective of the determination of a federal constitutional question, state law requires that the ultimate decision be against appellants, should this Court assume jurisdiction, either by appeal or certiorari?

2. Was the validity of a state statute, creating a Board to discharge "all and singular the duties, rights and powers of the City of Philadelphia, concerning all property and estate whatsoever, dedicated to charitable uses or trusts, the charge or administration of which are now or shall hereafter become vested in or confided to the City of Philadelphia," drawn in question as being repugnant to the Fourteenth Amendment, and was there a decision in favor of its validity by the state courts where, prior to a petition for reargument in the state court of last resort, no argument, either oral or written, concerning the statute was addressed by any party to any of the state courts, and where no question concerning the validity or invalidity of the statute was mentioned in any of the five opinions filed by the various state court judges?

3. Where the terms of a testamentary trust provide for the erection, operation and continued support of an orphan establishment for "poor white male orphans, between the ages of six and ten years", and no funds other than those of the testator have ever been used therefor, does administration of such trust in accordance with the directions of the testator by a municipality, the trustee designated by the will, acting only in its fiduciary capacity, violate the equal protection clause of the Fourteenth Amendment?

4 *Motion to Dismiss Appeal and Brief Contra Petition*

Statement of the Case.

Stephen Girard, by his will, probated December 31, 1831, made numerous gifts to various named individuals and organizations, to the cities of Philadelphia and New Orleans, and to the Commonwealth of Pennsylvania. He then gave most of his residuary estate in trust to erect a "college". His will sets forth at great length the details of the erection of the buildings, the selection of instructors, the curriculum and many other things. The college was to admit "as many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain" (App. 18a),³ with preference given to orphans born in Philadelphia, Pennsylvania, New York City and New Orleans. He named as trustee "the Mayor, Aldermen and Citizens of Philadelphia", the then corporate title of the city (App. 11a).

Appellants Foust and Felder applied for admission to Girard College on February 1, 1954, and were advised by the trustee that they could not be admitted because neither was a "poor white male orphan between the ages of six and ten years, as required by the Will of Stephen Girard, deceased" (R. 70a, 79a). On September 24, 1954, these appellants petitioned the Orphans' Court of Philadelphia County for an order directing their admission to the college. Petitions were also filed on behalf of the Mayor of the City of Philadelphia, the City of Philadelphia, the Philadelphia Commission on Human Relations and, later, the Commonwealth of Pennsylvania, joining in the prayer for such relief. On July 29, 1955, the hearing judge denied the petitions on the ground that Stephen Girard's will was clear and valid and that the operation of Girard College was lawful. Exceptions were dismissed by the Orphans' Court en banc. Appellants appealed to

(3) Stephen Girard's will is printed in full in appellee's appendix to this motion and brief, reference to which is herein made by "App."

the Supreme Court of Pennsylvania, which affirmed the decrees. In a carefully considered opinion, accompanied by a concurring opinion by Justice Bell, the court held that Stephen Girard's purpose was to establish an institution for poor white male orphans; that his will, many times upheld in the past against other attacks, is entirely valid; that the will is not discriminatory within the meaning of any constitutional doctrine; that Girard College is an orphan establishment operated entirely by private funds under the directions of a private will; that the administration of the trust is not contrary to any public policy or the Fourteenth Amendment; and that irrespective of any decision on the constitutional question appellants would not be entitled under state law to the relief sought.

Thereafter, appellants filed a petition for reargument in which, for the first time, they took the position that the issue in the case was not the validity of Girard's will or the administration of the Girard Estate by the city as trustee, but the constitutionality of the Act of June 30, 1869, P. L. 1276, which created the Board of Directors of City Trusts (hereinafter called the "Board") for the discharge of the fiduciary functions of the City of Philadelphia. This petition was dismissed without opinion.

SUMMARY OF ARGUMENT.

The appellants' Jurisdictional Statement does not properly state the true issues in this case. They have given a wholly false picture of both the nature of Girard's gift which created the college, and of the past and present contacts and relationship of the city and the state with the college, and of the opinions below.

In the courts below many questions directed to the Pennsylvania law of wills, trusts and public policy were raised and argued by appellants. There was but a single constitutional question—whether the Fourteenth Amendment forbids the City of Philadelphia to act as trustee for Stephen Girard. Whereas the courts below dealt with this question, among many others, and indicated that mere administration of this bona fide charitable trust by the city is not the type of "state action" which is prohibited by the Fourteenth Amendment, nevertheless each of those courts recognized that resolution of the constitutional issue does not decide the case. The prayer of the petition is that Foust⁴ and Felder be admitted to Stephen Girard's college. The constitutional question concerns itself with the competency of the city to serve as trustee. Thus, even if the courts below erred in their decision on the constitutional question—which they clearly did not—still that would not mean that Foust and Felder would be admitted to the college. The courts below held that under the law of Pennsylvania the trust for "poor white male orphans" would continue as such, irrespective of the competency of the trustee.

None of the parties to this suit has requested that the trustee of the Girard Estate be changed. We submit that appellants, clearly recognizing that this court would not grant certiorari to review an academic question of consti-

(4) As to Foust this appeal is moot. He is now over ten years of age (R. 61a, para. 2).

Motion to Dismiss Appeal and Brief Contra Petition 7

tutional law, however interesting it might be, have attempted to bring that question before the court by way of an improper appeal. This appeal is predicated upon a question of the validity of a state statute which was at no point drawn in question in the state courts, and on which there has been no decision whatever by any of those courts.

In addition to the non-federal basis for the decision below, and to the fact that the decision below does not support a direct appeal, this case does not involve a substantial federal question that would entitle appellants either to an appeal or to a grant of certiorari. It is not a case of either discrimination or "state action", but involves only the right of an individual to leave his estate to the persons of his choice.

In any event, the decision of the judges of the Philadelphia Orphans' Court and Pennsylvania Supreme Court is so clearly in accord with the principles distinguishing individual from state action, as announced by this Court in the Fourteenth Amendment cases, that review by this Court is not warranted.

ARGUMENT.

Stripped of misleading statements and arguments,⁵ this is not a case of racial discrimination but one involving the basic concepts of the law of charitable trusts.⁶ As Mr. Chief Justice Stern, speaking for the majority of the court below, said (J. S. 25):

“While it may seem unfortunate that the court is obliged to sanction the exclusion of any child from even a *private* school or orphanage because of race, creed or color if otherwise entitled to admission, the Court is clearly of opinion that the unanimous decision of the Orphans’ Court, supported by the learned and comprehensive opinions of Judge BOLGER and Judge LEFEVER, must be affirmed, it being clearly understood at the outset that the beneficiaries of the charity of Stephen Girard are not being determined by the State of Pennsylvania, nor by the City of Philadelphia, nor by this Court, but solely by Girard himself in the exercise of his undoubted right to dispose of his property by will, and, in so doing, to say, within the bounds of the law, who shall enjoy its benefits.”

1. The Background.

The only difference between Girard College and any other charitable trust is that the administration of the private funds endowing the school has been entrusted to a public corporation rather than a private body. However, in an effort to maximize the contacts of the city and state with Girard College, appellants have given a wholly false picture of the nature of Girard’s gift, and have re-

(5) See the discussion of such statements and arguments in the concurring opinion of Mr. Justice Bell (J. S. 43).

(6) Of the thirteen judges who heard the case only Justice Musmanno dissented. A reading of his opinion will show that he misunderstood the background of the case, much as appellants have in their Jurisdictional Statement.

ferred to a great number of instances of activity by state or city officials and public bodies which, under analysis, either had nothing to do with Girard College or were simply administrative rules for the trusteeship.

The Supreme Court of Pennsylvania expressly held that Girard's gift was for the benefit of his named beneficiaries (poor white male orphans) and not a gift to or for the benefit of the city (J. S. 29, 40-41). The question of Girard's intention was elaborately argued below. The court held that Girard intended the city to be merely the title holder of his estate, that he directed the city to use his estate only for the purposes specified in the will, and that he did not intend to empower the city to conduct the college in its public or governmental capacity (J. S. 35). In spite of these conclusions on questions of state law, appellants state as a fact that Girard left his estate "to the City of Philadelphia for various municipal purposes, the most important of these being the establishment of Girard College" (J. S. 5). In view of the decision below that the college was, like any other charitable gift of such a nature, intended for the benefit of the named beneficiaries, appellants' statement obliterates the principal distinction upon which the judgments below rest.

To the same effect, and presumably for the same purpose, is the reiteration of the argument made below that the operation of Girard College has to be a "public function", regardless of Girard's intent, because the city can only be a trustee for "public purposes", citing *Philadelphia v. Fox*, 64 Pa. 169 (1870). That decision also stated that "all charities are in some sense public" (*Id.* at p. 182), and it is clear that the decisions referring to the operation of Girard College as "public" mean no more than that the college is a valid charity. Any other charity, whether the trustee is a public body or not, has to be "public" in the same manner in order to be a valid charity. Any other charity in Pennsylvania would also be entitled to the tax exemption noted by appellants; Girard College's

10 Motion to Dismiss Appeal and Brief Contra Petition

exemption arises from the fact that it is a purely public charity, not from any city or state contacts.

~~Appellants refer to a number of state statutes and city ordinances. These they describe as "the foundation and support of what Girard wanted" (J. S. 7). A study of these statutes and ordinances and of the background of the trusteeship as interpreted in court decisions for over a century, shows this statement as applied to Girard College to be flagrantly misleading.~~

The city's trusteeship of Girard College did not arise from any statute or ordinance passed following Girard's death, and the city's competency to act as trustee did not depend on any such legislative action. From 1701 to 1776 Philadelphia acted under the charter granted by William Penn. Following an interim period, the legislature granted the city a charter in 1789, under which the city was incorporated as "The Mayor, Aldermen and Citizens of Philadelphia."⁷ It was in *this* charter that this Court found the inherent power of the city to act as Girard's trustee. *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127, 186-189 (1844). Subsequent changes in the city and its government, such as the Consolidation Act of 1854 (Act of February 2, P. L. 21, 53 Purdon's Stat. § 6361 *et seq.*), have been held not to destroy the identity of the old corporation or alter its powers. *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1 (1869). The Act of June 30, 1869, P. L. 1276, creating the Board, was likewise held not to alter in any manner the identity or powers of the city as trustee. *Philadelphia v. Fox*, 64 Pa. 169 (1870). By virtue of its old charter the city has continued as a corporation to this day.

The competency of the city to act as trustee is not traceable to any of the statutes cited by appellants. Clearly the Act of 1869, which the appellants are challeng-

(7) The relevant portion of the Philadelphia Charter of 1789 is printed in appellee's appendix (App. 33a).

ing specifically, is not the source of the trustee's competency or of the acceptance of the trust; the trust was over 35 years old when that act was passed and that act did not change the trustee. *Philadelphia v. Fox*, 64 Pa. 169 (1870). The Acts of March 24 and April 4, 1832 (J. S. 6-7, 115-116), passed soon after Girard's death, did not authorize the city to accept the trust and did not even purport to be the source of the city's competency to act as trustee of the college. These statutes, which Girard requested, were passed to enable the city to make certain improvements to the eastern part of the city with gifts made by Girard's will. But these gifts had nothing whatever to do with Girard College, and the statutes had nothing to do with the city's trusteeship of the college. Girard requested no legislation whatsoever with respect to the college, and indeed he needed none. The whole of the Act of March 24, 1832, has been printed in appellee's appendix to show that the parts of that statute printed in appellants' appendix do not relate to the city's trusteeship of the college (App. 34a). A reading of these statutes, and of this Court's opinion in *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127 (1844), wherein the city's competency to act as trustee was found to be inherent in its charter, demonstrates that appellants' statement that "the city was enabled to accept the gift . . . only by reason of state legislative enactments" (J. S. 4) is not correct.

Appellants refer to statutes of 1847 and 1853 respecting the statutory guardianship of the city and the indenture of apprentices (J. S. 7, 116-120). Contrary to appellants' argument, Girard did not stipulate that any such legislation be enacted (App. 18a, Article XXI, para. 5). Such statutes did nothing more than confer on the trustee the same powers any private trustee would have had.

Appellants list certain of the city ordinances. Not one of these is anything more than an administrative measure such as any private trustee would adopt for the orderly

conduct of its business. They simply represent the manner in which the trustee acted prior to the enactment of the Act of June 30, 1869, for obviously if a trustee is to perform its responsibilities it must act. Being a corporate body, the city had to carry out its duties as trustee through the procedures by which it operated. Any private corporate trustee would likewise follow its own rules. It will be noted that there are no ordinances after the Board was created in 1869. This Court should also note carefully that the "appropriations" referred to in these ordinances were not appropriations of public funds but appropriations of funds for the college out of Girard's trust.

The source of the city's competency to act as trustee does not lie in any of the public acts cited by appellants. Those acts did not purport to create the college or to establish the trust. They did not confer benefits either on the college or on its students. Those that had anything to do with the college were mere administrative measures detailing the administration of the trustee's powers conferred in the will. None of these measures enlarge the sole difference between Girard College and any other charitable trust—the trusteeship of a public corporation.

The above analysis of the statutes and ordinances relates to the source of the competency of the trustee. An entirely different and more important question is the source of the power of the trustee (which is treated in more detail *infra* p. 21)—appellants treat this in the same breath with the question of competency. None of the above statutes and ordinances, not even the Philadelphia charter of 1789, is the source of the validity of the trust or the powers of the trustee to execute it. The "foundation and support" of Girard College is Girard's will and the estate he accumulated. In *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127 (1844), this Court held that the competency of the city to act as trustee lay in its inherent charter powers. Far more importantly, it held that even if the city were not competent

the trust would not fail; a trustee competent to act would be found (*Id.* at pp. 188-189). The trust was valid in any event and would be enforced in accordance with the terms of the will.

2. This Court Has No Jurisdiction, Either by Appeal or Certiorari, Because the Relief Requested Will Not Be Affected by a Decision on the Federal Question Presented.

It is well established that before this Court can assume jurisdiction there must be a case or controversy, and "it must appear that valuable legal rights asserted by the complainant are threatened with imminent invasion by defendants and will be directly affected to a specific and substantial degree by the decision of the questions of law presented in the case". *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States*, § 260, p. 467 (1951). This Court has held that it "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California v. San Pablo and Tulare R. R. Co.*, 149 U. S. 308, 314 (1893).

The "thing in issue" in this case is the right of two of the appellants to be admitted to Girard College. The federal question raised by appellants was that the operation of the college violates the Fourteenth Amendment because the trusteeship of the city constitutes "state action". The Pennsylvania courts decided that the city's trusteeship did not amount to "state action" in the slightest degree (a question dealt with *infra* p. 21).

The Supreme Court of Pennsylvania also decided that even if the trusteeship of the city were "state action", it could not grant appellants the remedy they seek (J. S. 39). Any vice in the operation of the college would lie in the competency of the city to serve as trustee, not in the validity of the trust itself. *Shelley v. Kraemer*, 334 U. S. 1, 13

14 *Motion to Dismiss Appeal and Brief Contra Petition*

(1948). The principle that a valid trust will not fail for want of a trustee was laid down in this very case, by this Court, which held that if the city did not have capacity to serve as trustee, a competent trustee would be appointed. *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127, 188-189 (1844); *Girard v. Philadelphia*, 74 U. S. (7 Wall.) 1, 12-13 (1869). Many other Pennsylvania cases have followed this rule (J. S. 39-40).

Appellants say that this was "dictum", that there was an "observation" by the court below that it "might" substitute a private trustee for the Board (J. S. 21-22). The court below was not equivocal. The opinion flatly states that if the operation of the college is state action "petitioners would nevertheless not be entitled to the remedy they seek" (J. S. 39). "The law is clear that the remedy is, not to change that provision [prescribing poor white male orphans] . . . but for the Orphans' Court . . . to appoint another trustee" (J. S. 39). Thus the court held that as a matter of state law the prayer of appellants that Foust and Felder be admitted to Stephen Girard's college could not be granted. Appellants, apparently recognizing that a decision on the federal question would not affect the relief sought, did not attack the trustee as such but sought to have the will construed to eliminate the word "white". This the state courts refused to do.

Appellants assert that this non-federal basis for the decision should be ignored for two reasons. First, they say that the city improperly serves as trustee. But they do not ask that the trustee be removed; indeed they ask that the city continue as trustee, but for different beneficiaries. A decision by this Court that the city acts unlawfully will not accomplish the desires of anyone party to this litigation. Second, appellants say that removal of the trustee will not erase "the long history of extensive state and local government aid" (J. S. 22). The true nature of this alleged aid has already been dealt with (*supra* pp. 10-13). Appellant's argument is that Girard College has

been converted over the years into a public school simply through the trusteeship of the city. By the same token it could be said that a private trustee is entitled to the trust property if he administers it for a long enough time.

The court below has determined as a matter of state law that the trust being valid, Foust and Felder, non-beneficiaries of the trust, have no right to claim under it. Even if the federal question presented by appellants, which concerns itself with the competency of the trustee, should be deemed substantial, a contrary decision thereon by this Court will not affect any right of appellants or entitle them to the relief they seek.

3. This Court Has No Jurisdiction by Way of Appeal, No State Statute Having Been Drawn in Question as Being Repugnant to the Fourteenth Amendment.

Appellants, seeking jurisdiction by appeal, state that the federal question in issue involves the validity of the Act of June 30, 1869, P. L. 1276, 53 Purdon's Stat. § 6481 *et seq.* (J. S. 112), which created the Board for the discharge of the city's fiduciary duties. This statute was not drawn in question by any of the appellants in the state courts until the filing of their petition for reargument with the Pennsylvania Supreme Court. There was no decision whatever on this question by any of the courts below. Accordingly the question is not before this Court, and the appeal should be dismissed.

The litigation was initiated by a petition by the city for admission of appellants Foust and Felder to the college (R. 8a). In this petition the city's primary position, to which it devoted ten of its seventeen paragraphs, was that Girard's intention, and the terms of the will, were such that the will did not bar the admission of Foust and Felder. The petition also alleged that denial of their admission was contrary to the public policy of the city and state and that the Board's action violated the Fourteenth Amendment.

There were no allegations whatever that the Act of 1869 was invalid. At the same time petitions were also filed by Foust and Felder (R. 61a, 70a). These petitions likewise alleged that the will did not bar the petitioners, and that the action of the Board was contrary to public policy and violated the Fourteenth Amendment. They did not even mention the Act of 1869. The Board's answers to each of these petitions (R. 80a, 98a, 103a) were responsive to the allegations thereof and did not raise a question of or advert to the validity of the Act of 1869. Likewise the Commonwealth, in its petition (R. 116a), did not take the position that the Act of 1869 was unconstitutional.

Briefs and oral argument followed the pleadings. Not once did any of the appellants question the validity of the Act of 1869, or even advert to any issue in respect to it. Judge Bolger's 38-page opinion does not refer to, much less decide, any such issue (R. 119a). That opinion states the issue to be whether the word "white" should be eliminated from the will (R. 127a). The decision was that it could not be: Girard intended a college only for poor white male orphans. The federal question decided was whether the Board's action was "state action" (R. 131a), with respect to which appellants' contentions were that the will was a restrictive covenant that the court could not enforce, and that the operation of the college by the Board was a denial of equal protection of the laws (R. 133a-134a). The opinion's lengthy treatment of the federal question (R. 131a-149a) makes one brief reference to the Act of 1869, and that reference is purely historical.⁸

The city, the Commonwealth, and appellants Foust and Felder filed exceptions to Judge Bolger's decree to the Orphans' Court en banc (R. 156a, 161a, 165a). These ex-

(8) The court noted the case of *Philadelphia v. Fox*, 64 Pa. 169 (1870), where "the constitutionality of the Act of 1869 . . . was sustained" (R. 145a). This statement is simply a reference to the holding of that case that the transfer of fiduciary functions to the Board by the Act of 1869 was valid and not a violation of any "contract" with Girard.

ceptions, totalling 82 in number, * contained not one word of reference to the Act of 1869, or to any problem, constitutional or otherwise, in respect to it. In its opinion dismissing these exceptions (J. S. 170a-184a), the Orphans' Court made only a single oblique reference to the Act of 1869 (J. S. 178a); which had nothing whatever to do with its constitutionality.

The same story was repeated in the Supreme Court of Pennsylvania. - There was not one word of argument, written or oral, directed to the Act of 1869. Nor is there a single word on any such question, much less a decision of any kind on it, in any of the opinions, including the dissenting opinion of Mr. Justice Musmanno.

It thus can be seen that the federal question argued by the parties throughout this litigation was whether the Board violated the Fourteenth Amendment in declining to approve the application for admission to the college of Foust and Felder because they are not "poor white male orphans, between the ages of six and ten years" as required by the will. This question involves the validity of the acts of individuals allegedly acting on behalf of the state and in violation of an asserted federal right of Foust and Felder. As such it is reviewable here, if at all, only by way of certiorari.

Subsequent to the judgment of the Supreme Court of Pennsylvania, appellants asserted, for the first time, that the question involved was the validity of the statute creating the Board. Their petition for reargument was dismissed without opinion, as a matter of discretion, by the Supreme Court under its Rule 69. This Court has stated many times that a federal question raised for the first time in a petition for reargument, and not decided by the state court, comes too late for review by this Court.¹⁰ The same

(9) However, many are duplicates.

(10) *Radio Station WOW v. Johnson*, 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932); *Wall v. Chesapeake & Ohio Ry. Co.*, 256 U. S. 125 (1921); *Godchaux Co. v. Estopinal*, 251 U. S. 179 (1919); *St. Louis and*

rule holds where the questions actually argued below are reviewable only by certiorari and the appellant has attempted a direct appeal by challenging a state statute in a petition for reargument. *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U. S. 1, 6 (1920); *Citizens National Bank of Cincinnati v. Durr*, 257 U. S. 99, 106 (1921); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 185-187 (1945).

Appellants nevertheless say that they did raise the question of the validity of the Act of 1869, and that the Supreme Court of Pennsylvania did decide the question. They say that the city stated the question in its brief to the Orphans' Court and that the Commonwealth did the same in the Supreme Court. These statements appeared in the "Questions Involved" in the briefs.¹¹ This was at least a misnomer since such a question was not involved and no argument on either side, written or oral, was ever addressed to such a question. Appellants footnote their allegations with references to the argument portions of their briefs (J. S. 12-13, footnotes 9-10). The implication that the question was argued in those portions of the briefs is without any justification whatever. Not one word was addressed to any question of the validity of the Act of 1869.¹²

San Francisco R. Co. v. Shepherd, 240 U. S. 240 (1916); *Forbes v. State Council of Virginia*, 216 U. S. 396 (1910); *Waters-Pierce Oil Co. v. Texas* (No. 2), 212 U. S. 112 (1909); *Corkran Oil and Development Co. v. Arnaudet*, 199 U. S. 182 (1905); *Loeber v. Schroeder*, 149 U. S. 580 (1893).

(11) By the use of the words "see also", appellants imply that each of them mentioned this question before both the Orphans' Court and the Supreme Court (J. S. 12-13, footnotes 9 and 10). Such an implication is totally unwarranted. Question No. 4 of the Commonwealth's brief, and Questions Nos. 2 and 3 of Foust and Felder's brief, in the Orphans' Court made no reference whatever, express or implied, to the Act of 1869. Question No. 1 of the city's brief, and Questions Nos. 2-4 of Foust and Felder's brief, in the Supreme Court likewise raised no question whatever regarding that statute.

(12) Pp. 14-27 of the Commonwealth's brief in the Orphans' Court (J. S. 12, footnote 4) made one brief reference to the Act of 1869 (p. 17 of that brief) in the course of discussing whether the

While a question concerning the Act of 1869 may thus have been obscurely noted, the statute can scarcely be said to have been "drawn in question" as required by 28 U. S. C. A. § 1257(2), in view of the history of the case outlined above.

Appellants appear to take the position that the Supreme Court necessarily decided the question in determining that the Board did not violate the Fourteenth Amendment by complying with Girard's will, although nowhere did the court describe the situation in appellants' terms: "city officials authorized to act under, and acting pursuant to, the Act of June 30, 1869, could exclude negroes" (J. S. 2). This is an argument that the decision on the constitutionality of an official's act is necessarily a decision on the validity of the statute creating his position or outlining his powers.

The cases cited above (p. 18), including *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U. S. 182 (1945), refute such an argument. None of appellants' cases support it. *Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934), and *Atchison, Topeka & S. F. R. Co. v. Public Utilities Commission*, 346 U. S. 346 (1953), were decisions that rules promulgated by a state board or commission were themselves legislative acts reviewable by appeal. They have nothing to do with this case. *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282 (1921), involved a statute specifically drawn in question and on the validity of which the state court had expressly ruled. In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), the grounds for the state court's deci-

college was a "public function". Pp. 9-32 of Foust and Felder's brief in the Orphans' Court (*Ibid.*) only referred to the Act of 1869 to support their argument that the Board is an agent of the city (pp. 12-13 of that brief). Neither brief made any other reference whatever to that statute and nowhere raised any question of its constitutionality. The briefs in the Supreme Court of Pennsylvania (pp. 6-22 of the city's brief and pp. 8-37 of Foust and Felder's brief; J. S. 13, footnote 10) likewise did not raise any question whatever of the validity of the Act of 1869.

sion that the educational program was valid was that the statutes in question granted the Board the authority to establish the program. The state court held that these statutes contained a "mandate" to the Board (396 Ill. 14, 28 (1947)), and it was "this holding" that this Court found to be "sufficient to show that the validity of an Illinois statute was drawn in question" (333 U. S. at p. 206). There has been no similar decision by any state court in this case.

Whether or not appellants raised a question of the validity of the Act of 1869, such a question has nothing to do with this case. It is from the will, not the Act of 1869, that the Board derives its powers. That statute did not confer any benefits on anyone, much less the benefits in which appellants Foust and Felder now seek to share. The statute did not select the trustee and did not define its powers and duties. The source of all rights, privileges, powers and authority in this case is Girard's will. In the terms of the *McCullum* case, the "mandate" here is found in the will.

If adopted, appellants' argument would make virtually all Fourteenth Amendment cases reviewable by direct appeal. Since "state action" is necessary in such cases, and since any act by a public official is necessarily pursuant to some statute creating his office and conferring on him his powers, appellants' argument would make every decision on the constitutionality of the act of an official a decision on the validity of the statute under which he purported to act, even though that statute does no more than create the official's office. The distinction created by 28 U. S. C. A. § 1257(2) and § 1257(3) would cease to exist.

Further it should be noted that even if the trustee can be said to be "acting" under a statute or other state authority, rather than under the will, it is certainly not acting under the Act of 1869. That statute, which applied to all of the many trusts of which the city is trustee and not merely to the Girard Estate, simply created the Board. But the city, not the Board, is the trustee, and had been acting as such for over 35 years when the Act of 1869 was

passed. The Act of 1869 did not create a new trustee or substitute trustees. It simply transferred the administration of the trust from one city agency to another; the city itself continued as trustee. *Philadelphia v. Fox*, 64 Pa. 169 183 (1870).

Appellee, for the foregoing reasons, respectfully submits that the appeal should be dismissed.

4. Certiorari Should Be Denied Because the Supreme Court of Pennsylvania Did Not Decide a Federal Question of Substance.

Appellee submits that certiorari should be denied because the Supreme Court of Pennsylvania did not decide "a federal question of substance" under Rule 19(1)(a) of this Court. That court decided that the only possible distinction between Girard College and any other charitable trust—the trusteeship of the city—did not constitute a denial by the state of the equal protection of the laws. Neither Girard College nor any part of the Girard Estate belongs to the city or is in any manner public property. The city itself has long recognized this in its treatment of the college and of the trust property.¹³ Not a penny of public funds has ever been spent on the college. Like any other trustee of a private trust, the Board must account to the Orphans' Court and not to the city. *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545 (1936).¹⁴

Appellants say that regardless of whose property it is, it is "state action" for the city to refuse the applications of Foust and Felder. But it is not the city which determines who the students of the college shall be. As trustee, the city

(13) See the discussion of this by the court below, J. S. 71-72.

(14) Appellants point to the requirement in the Act of 1869 that the Board report periodically to the City Council and the state legislature. This requirement is subordinate to the primary duty of the Board to report to the Orphans' Court (*Wilson v. Board of Directors of City Trusts*, 324 Pa. 545, 553 (1936)), and it should be noted that Girard's will contains such a requirement (App. 28a, Article XXIV).

has no choice but to follow the directions in the will. The "discretion" which appellants mention (J. S. 6) refers only to the details of the organization of the college; Girard expressly enjoined the city from using his estate for any purposes other than those specified in his will. See Article XXIV of the will (App. 27a), and the opinions below (J. S. 40-41, 47-50). It is the will, not the city, or its agent the Board, or any state statute, which grants benefits to some, and in so doing necessarily denies them to others. The selection of students does not in any manner stem from state or city policy. Indeed, with the city and the state standing in their behalf in this litigation, appellants Foust and Felder can scarcely be called the victims of discriminatory state policy.

It is incorrect, therefore, for appellants to label the Act of 1869 "the effective source of power for the management of Girard College" (J. S. 9). If that phrase is intended as a test of "state action", it is not met here. No trustee of Girard College, be it a public body or a private trustee, could act otherwise than as the will dictates. The will, on the other hand, does not depend on the trusteeship of the city or the Board for its effectiveness. *Vidal v. The Mayor, Aldermen and Citizens of Philadelphia*, 43 U. S. (2 How.) 127, 188-189 (1844).

In contending that the decision below creates a special status for one type of state activity, appellants not only assume their conclusion by labeling that activity "state action", they fail to recognize that the Board has long had a status so special that it is not even considered part of the governmental machinery of Philadelphia. The Act of 1869 itself was a measure designed to remove trusts administered by the city from the city government. *Philadelphia v. Fox*, 64 Pa. 169, 183 (1870). The Philadelphia City Charter expressly excludes the Board as an arm of the government in order "to protect its special status as trustee" (J. S. 38). The very manner in which this litigation has been treated by the city—bringing suit against itself

through orderly judicial processes—emphasizes the historic status of the Board.¹⁵

This case involves the right of an individual to leave his property for charitable purposes of his own choosing. It has always been a fundamental legal principle that a man at his death may leave his property to the persons of his choice (J. S. 30). A valid charitable gift does not require that all or even a large part of the public be permitted to share the gift. This right of every individual is protected by the state, which, as *parens patriae*, is defender of all charities, and which, through its laws and court system, supplies the guarantee that a charitable gift will be devoted to the purposes specified by the donor and not confiscated by others.

Girard did not have funds sufficient to found a college for the education of all poor children. To say that he practiced discrimination solely because he necessarily had to select a class of beneficiaries is to impugn not only his motives but the moral character of every individual who leaves his property to old ladies, or to Presbyterian ministers, or to Jews, or to a Roman Catholic convent, or to Indians. Yet throughout this litigation appellants have attempted to convince the state courts that selection, inevitably made by individual testators, is within the Fourteenth Amendment's prohibition against discrimination. They have sought to make this a Segregation Case.

If Girard discriminated against negroes, he also discriminated against girls and against children with fathers, however poor. Appellants Foust and Felder were not denied admission to the college because they were negroes but because they were *not* "poor white male orphans, be-

(15) Appellants emphasize that the City Treasurer is treasurer of the college (actually he is Treasurer of the Board; not the college; Act of 1869, § 3, J. S. 113) and that the Mayor and President of City Council are members of the Board. The Supreme Court of Pennsylvania noted that the reason for this had nothing to do with any special city control over the college (J. S. 38).

tween the ages of six and ten years". It should be noted that there are many more poor white male orphans than the college can accommodate; for every oriental, negro, Indian, female, or non-orphan admitted to the college, one of the class specified by Girard will be deprived of the benefits Girard desired to give him. If Girard discriminated, then every charity of whatever kind that is for the benefit of one religious group likewise discriminates. If the city's trusteeship is "state action", then the protection given by the state to all charities is likewise prohibited by the Fourteenth Amendment.

Of the thirteen judges who have studied this case, twelve concluded that this is neither a discrimination nor a "state action" case. In doing so, they decided not only the applicability of the Fourteenth Amendment, but the even more searching question of the public policy of the Commonwealth of Pennsylvania. It is stated with little fear of contradiction that the standards Pennsylvania has set for the relations of the races go far beyond the requirements of the Fourteenth Amendment. Discrimination has been prohibited in areas of "individual" as opposed to "state" action. Examples are the Pennsylvania Fair Employment Practice Act (Act of October 27, 1955, P. L. 744, 43 Purdon's Stat. § 951 *et seq.*); the Urban Redevelopment Act (Act of May 24, 1945, P. L. 991, § 11, 35 Purdon's Stat. § 1711(a)(8)), the Public Contracts Act (Act of May 1, 1933, P. L. 103, art. VII, § 808, as amended, 53 Purdon's Stat. § 19093-808), and many others. Racial discrimination in public schools was abolished in 1881 (Act of June 8, 1881, P. L. 76, now found in Act of March 10, 1949, P. L. 30, art. XIII, § 1310, as amended, 24 Purdon's Stat. § 13-1310), long before this Court's decision in *Brown v Board of Education of Topeka*, 347 U. S. 483 (1954). In concluding that nothing in this case contravenes state policy, the Supreme Court of Pennsylvania applied standards higher and more far-reaching than the bare requirements of the Fourteenth Amendment.

This case involves the right of one man to confer his bounty on selected individuals; it involves his will. Girard's will admits only "poor white male orphans, between the ages of six and ten years" to but one private school—this in a city and state where there exist equal, non-segregated educational opportunities for everyone.

5. The Federal Question Was Correctly Decided.

The decision of the Supreme Court of Pennsylvania recognized that this case does not involve discrimination. Even if discrimination can be read into the case, its source is Girard and his will, not the state, the city or the Board. The court below concluded that the operation of Girard College "does not in the slightest degree represent state action" (J. S. 39).

This is in accord with every decided case. None of the Fourteenth Amendment cases cited by appellants involved a situation similar in any degree to the operation of Girard College. The instant case, unlike the housing project, swimming pool, and similar cases, does not involve public property.¹⁶ In such cases the state is doing indirectly what it cannot do directly, with property dedicated to the use of all citizens. Nor does this case bear any resemblance to the cases where discrimination was decreed by statute or ordinance.¹⁷

Appellants cite cases for the proposition that individual action has been found unlawful under the Fourteenth Amendment. Some of these cases had nothing whatsoever to do with that Amendment but were cases involving the validity of private contracts under specific

(16) *Rudder v. United States*, 226 F. 2d 51 (D. C. Cir., 1955); *Baltimore City v. Dawson*, 350 U. S. 877 (1955); *Lawrence v. Hancock*, 76 F. Supp. 1004 (S. D. W. Va., 1948); *Department of Conservation and Development v. Tate*, 231 F. 2d 615 (4th Cir., 1956), cert. denied, 352 U. S. 838; *Muir v. Louisville Park Theatrical Ass'n*, 347 U. S. 971 (1954).

(17) *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954); *Buchanan v. Warley*, 245 U. S. 60 (1917).

statutes.¹⁸ Other cases, such as *Terry v. Adams*, 345 U. S. 461 (1953), and *Marsh v. Alabama*, 326 U. S. 501 (1946), were cases where exclusive public functions such as voting and law enforcement had been in fact or in effect delegated by the state to private individuals. *Valle v. Stengel*, 176 F. 2d 697 (3d Cir., 1949), cited by appellants as being "in direct conflict" with the decision below (J. S. 16), involved an action under the civil rights statutes (now 42 U. S. C. A. §§ 1981-1983, 1985) wherein the issue was the sufficiency of the complaint, and the allegation was that a police officer had deprived plaintiffs of their rights to enter into contracts. It has nothing whatever to do with this case.

Finally, *Shelley v. Kraemer*, 334 U. S. 1 (1948), and *Barrows v. Jackson*, 346 U. S. 249 (1953), have no bearing on Girard College. The Board "is not acting as a sovereign or as an agency of or for the state" (conc. op. below, J. S. 80), unlike the courts enforcing the restrictive covenants in those cases, but solely as the agent of a private citizen. No one has "acted" in this case to deprive appellants of any right. As the court below noted, it was appellants Foust and Felder who sought state action to invalidate Girard's will (J. S. 80). In so far as Girard College is analogous to a restrictive covenant at all, this case is more nearly similar to *Charlotte Park and Recreation Commission v. Barringer*, 242 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied sub nom. *Leeper v. Charlotte Park and Recreation Commission*, 350 U. S. 983 (1956), where a racially restrictive provision in a deed was held valid and allowed to take effect by reverter; no "state action" was involved.

Appellants contend that the Fourteenth Amendment prohibits state action of every kind, and that it is error to carve out a single exception for fiduciary functions (J. S. 14, 15, 18). But the "state action" prohibited by the Fourteenth Amendment does not proscribe all forms

(18) *Tunstall v. Brotherhood of Locomotive Firemen & Engineers*, 323 U. S. 210 (1944); *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944).

of state aid to individuals which may have the incidental effect of benefiting members of one race, religion or denomination. *Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512, 87 N. E. 2d 541 (1949), *cert. denied*, 339 U. S. 981 (1950), involving substantial state aid to a private housing project, and *Norris v. Mayor and City Council of Baltimore*, 78 F. Supp. 451 (D. Md., 1948), involving considerable aid, financial and otherwise, to a private school, were held not to constitute state action. In *Zorach v. Clauson*, 343 U. S. 306 (1952), this Court held that the degree to which the state there aided religious instruction did not violate the Fourteenth Amendment. The state participates when its agents probate wills, when municipal fire departments protect private dwellings, and when a city furnishes electricity and water to homes. But to our knowledge it has not yet been contended that, under the Fourteenth Amendment a will cannot be probated if it contains a bequest to one race or religion, or that the city cannot furnish water to homes of persons who discriminate in choosing their guests. It is not a question of "carving out" an exception to a limitless rule, but of drawing a proper line between what may fairly be said to be state action and what may fairly be said to be private action."

None of the decided cases supports appellants' contention that the court below drew this line improperly. A trustee does not act for himself. This Court's decision in *Reuben Quick Bear v. Leupp*, 210 U. S. 50 (1908), included a discussion of the question whether the government's position as trustee of Indian funds impressed those funds with the prohibitions of the First Amendment (*Id.* at pp. 81-2). The mere fact that a public body was trustee

(19) "The Due Process Clause does not disregard vital differences. If it be said that these are all differences of degree, the decisive answer is that recognition of differences of degree is inherent in due regard for due process". Concurring opinion of Messrs. Justices Frankfurter and Harlan, *In re Groban*, United States Supreme Court, February 25, 1957.

28 *Motion to Dismiss Appeal and Brief Contra Petition*

did not convert private property into public property, and the government did not "act" contrary to the First Amendment by paying out the funds to sectarian schools in compliance with the directions of the Indian beneficiaries. The position of the government in that case is the same as that of the city here.

If the city's trusteeship is within the prohibitions of the Fourteenth Amendment, no public body can act as trustee. If state participation in any degree is "state action", few charities are valid. Individual testators and donors of necessity exercise selection. If the validity of their selection is to be tested by the same standards as the "reasonableness" of "classifications" under the equal protection clause, a great number of charities now in existence must be declared invalid. Religious and racial distinctions cannot be indulged in by the state, but they are the foundation of an enormous number of charities and trusts. Until now there has been no question of their validity.

CONCLUSION.

The appeal should be dismissed for the reason that no state statute was drawn in question in the state courts, and there has been no decision on the validity of any state statute.

The appeal should be dismissed, and certiorari should be denied, for the further reason that the appeal (or petition) does not present a substantial federal question. In no event can appellants obtain the relief they seek.

Respectfully submitted,

JOSEPH P. GAFFNEY, SR.,
OWEN B. RHOADS,

Attorneys for Appellee.

Appendix.

APPENDIX A.

WILL OF STEPHEN GIRARD.

Dated February 16, 1830. Codicil dated June 20, 1831.

Proved December 31, 1831.

Recorded Philada. Will Book 10, p. 198.

I, Stephen Girard, of the City of Philadelphia, in the Commonwealth of Pennsylvania, mariner and merchant, being of sound mind, memory, and understanding, do make and publish this my last will and testament, in manner following, that is to say

I. I give and bequeath unto "The Contributors to the Pennsylvania Hospital," of which corporation I am a member, the sum of thirty thousand dollars, upon the following conditions, namely, that the said sum shall be added to their capital, and shall remain a part thereof forever, to be placed at interest and the interest thereof to be applied, in the first place to pay to my black woman Hannah (to whom I hereby give her freedom) the sum of two hundred dollars per year, in quarterly payments of fifty dollars each in advance, during all the term of her life; and, in the second place, the said interest to be applied to the use and accommodation of the sick in the said hospital; and for providing and at all times having competent matrons, and a sufficient number of nurses and assistant nurses, in order not only to promote the purposes of the said hospital, but to encrease this class of useful persons much wanted in our city:

II. I give and bequeath to "The Pennsylvania Institution for the Deaf and Dumb" the sum of twenty thousand dollars, for the use of that institution:

III. I give and bequeath to "The Orphan Asylum of Philadelphia," the sum of ten thousand dollars for the use of that Institution:

IV. I give and bequeath to "the Comptrollers of the public schools for the city and county of Philadelphia" the sum of ten thousand dollars for use of the schools upon the Lancaster system, in the first section of the first school district of Pennsylvania.

V. I give and bequeath to "The Mayor, Alderman and Citizens of Philadelphia," the sum of ten thousand dollars, in trust safely to invest the same in some productive fund, and with the interest and dividends arising therefrom to purchase fuel between the months of March and August in every year forever, and in the month of January in every year forever distribute the same, amongst poor white housekeepers and roomkeepers, of good character, residing in the city of Philadelphia.

VI. I give and bequeath to the society for the relief of poor and distressed masters of ships, their widows and children, (of which society I am a member) the sum of ten thousand dollars to be added to their capital stock, for the uses and purposes of said society.

VII. I give and bequeath to the gentlemen, who shall be trustees of the Masonic Loan at the time of my decease, the sum of twenty thousand dollars, including therein ten thousand and nine hundred dollars due to me, part of the Masonic Loan, and any interest that may be due thereon at the time of my decease, in trust for the use and benefit of "the Grand Lodge of Pennsylvania and masonic jurisdiction thereto belonging," and to be paid over by the said trustees to the said Grand Lodge for the purposes of being invested in some safe stock or funds, or other good security, and the dividends and interest arising therefrom to be again so invested and added to the capital, without applying any part thereof to any other purpose until the whole

capital shall amount to thirty thousand dollars, when the same shall forever after remain a permanent fund or capital, of the said amount of thirty thousand dollars, the interest whereof shall be applied from time to time to the relief of poor and respectable brethren: and in order that the real and benevolent purposes of masonic institutions may be attained, I recommend to the several lodges not to admit to membership, or to receive members from other lodges, unless the applicants shall absolutely be men of sound and good morals.

VIII. I give and bequeath unto Philip Peltz, John Lentz, Francis Hesley, Jacob Baker and Adam Young, of Passyunk township, in the county of Philadelphia, the sum of six thousand dollars, in trust that they or the survivors or survivor of them shall purchase a suitable piece of ground, as near as may be in the centre of said township, and thereon erect a substantial brick building, sufficiently large for a school house and the residence of a school-master, one part thereof for poor male white children, and the other part for poor female white children of said township; and as soon as the said school-house shall have been built, that they the said trustees or the survivors or survivor of them shall convey the said piece of ground and house thereon erected, and shall pay over such balance of said sum as may remain unexpended, to any board of directors and their successors in trust, which may at the time exist or be by law constituted, consisting of at least twelve discreet inhabitants of the said township, and to be annually chosen by the inhabitants thereof; the said piece of ground and house to be carefully maintained by said directors and their successors solely for the purposes of a school as aforesaid forever, and the said balance to be securely invested as a permanent fund, the interest thereof to be applied from time to time towards the education in the said school of any number of such poor white children of said township; and I do hereby recommend to the citizens of the

said township to make additions to the fund whereof I have laid the foundation.

IX. I give and devise my house and lot of ground thereto belonging, situate in rue Ramonet aux Chartrons, near the city of Bordeaux, in France, and the rents issues and profits thereof to my brother Etienne Girard and my niece Victoire Fenellon (daughter of my late sister Sophia Girard Capayron) (both residing in France) in equal moieties for the life of my said brother, and, on his decease, one moiety of the said house and lot to my said niece Victoire and her heirs forever, and the other moiety to the six children of my said brother, namely John Fabricius, Marguerite, Anne Henriette, Jean August, Marie, and Madelaine Henriette, share and share alike (the issue of any deceased child if more than one to take amongst them the parent's share) and their heirs forever.

X. I give and bequeath to my said brother Etienne Girard the sum of five thousand dollars, and the like sum of five thousand dollars to each of his six children above named: if any of the said children shall die prior to the receipt of his or her legacy of five thousand dollars, the said sum shall be paid, and I give and bequeath the same, to any issue of such deceased child, if more than one share and share alike.

XI. I give and bequeath to my said niece Victoire Fenellon the sum of five thousand dollars.

XII. I give and bequeath absolutely to my niece Antoinetta, now married to Mr. Hemphill, the sum of ten thousand dollars, and I also give and bequeath to her the sum of fifty thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said sum of fifty thousand dollars upon good security, and pay the interest and dividends thereof as they shall from time to time accrue, to my said niece for her separate use, during the

term of her life, and from and immediately after her decease, to pay and distribute the capital to and among such of her children and the issue of deceased children, and in such parts and shares as she the said Antoinetta, by any instrument under her hand and seal executed in the presence of at least two credible witnesses shall direct and appoint, and for default of such appointment then to and among the said children and issue of deceased children in equal shares, such issue of deceased children if more than one to take only the share which their deceased parent would have taken if living.

XIII. I give and bequeath unto my niece Carolina, now married to Mr. Haslam, the sum of ten thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said money upon good security, and pay the interest and dividends thereof from time to time, as they shall accrue, to my said niece, for her separate use, during the term of her life; and, from and immediately after her decease, to pay and distribute the capital to and among such of her children and issue of deceased children, and in such parts and shares, as she the said Carolina, by any instrument under her hand and seal executed, in the presence of at least two credible witnesses, shall direct and appoint, and for default of such appointment, then to and among the said children and issue of deceased children, in equal shares, such issue of deceased children if more than one, to take only the share which the deceased parent would have taken if living: but if my said niece Carolina shall leave no issue, the said trustee or trustees on her decease shall pay the said capital and any interest accrued thereon to and among Caroline Lallemand (niece of the said Caroline) and the children of the aforesaid Antoinetta Hemphill, share and share alike.

XIV. I give and bequeath to my niece Henrietta, now married to Dr. Clark, the sum of ten thousand dollars; and

I give and bequeath to her daughter Caroline (in the last clause above named) the sum of twenty thousand dollars—the interest of the said sum of twenty thousand dollars, or so much thereof as may be necessary, to be applied to the maintenance and education of the said Caroline during her minority, and the principal with any accumulated interest to be paid to the said Caroline, on her arrival at the age of twenty-one years.

XV. Unto each of the captains, who shall be in my employment at the time of my decease, either in port or at sea, having charge of one of my ships or vessels, and having performed at least two voyages in my service, I give and bequeath the sum of fifteen hundred dollars—provided he shall have brought safely into the port of Philadelphia, or if at sea at the time of my decease shall bring safely into that port, my ship or vessel last entrusted to him, and also that his conduct during the last voyage shall have been in every respect conformable to my instructions to him.

XVI. All persons, who, at the time of my decease, shall be bound to me by indenture, as apprentices or servants, and who shall then be under age, I direct my executors to assign to suitable masters immediately after my decease, for the remainder of their respective terms, on conditions as favorable as they can in regard to education, clothing, and freedom dues; to each of the said persons, in my service and under age at the time of my decease I give and bequeath the sum of five hundred dollars, which sums respectively I direct my executors safely to invest in public stock, to apply the interest and dividends thereof towards the education of the several apprentices or servants, for whom the capital is given, respectively, and at the termination of the apprenticeship or service of each to pay to him or her the said sum of five hundred dollars and any interest accrued thereon, if any such interest shall remain unexpended: in assigning any indenture, preference shall be given to the mother, father, or next relation, as assignee,

should such mother, father, or relative desire it, and be at the same time respectable and competent.

XVII. I give and bequeath to Francis Hesley (son of Mrs. S. Hesley, who is mother of Marianne Hesley) the sum of one thousand dollars, over and above such sum as may be due to him at my decease.

XVIII. I charge my real estate in the state of Pennsylvania with the payment of the several annuities or sums following (the said annuities to be paid by the treasurer or other proper officer of the city of Philadelphia appointed by the corporation thereof for the purpose out of the rents and profits of said real estate, hereinafter directed to be kept constantly rented) namely:

1. I give and bequeath to Mrs. Elizabeth Ingersoll, widow of Jared Ingersoll, esq., late of the city of Philadelphia, counsellor at law, an annuity or yearly sum of one thousand dollars, to be paid in half yearly payments, in advance, of five hundred dollars each during her life:—

2. I give and bequeath to Mrs. Catherine Girard, now widow of Mr. J. B. Hoskins, who died in the isle of France, an annuity or yearly sum of four hundred dollars, to be paid in half yearly payments in advance of two hundred dollars each, during her life.

3. I give and bequeath to Mrs. Jane Taylor, my present housekeeper (the widow of the late captain Alexander Taylor, who was master of my ship *Helvetius* and died in my employment) an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each, during her life.

4. I give and bequeath to Mrs. S. Hesley, my housekeeper at my place in Passyunk Township, an annuity or yearly sum of five hundred dollars, to be paid in half yearly payments in advance of two hundred and fifty dollars each during her life.

5. I give and bequeath to Marianne Hesley, daughter of Mrs. S. Hesley, an annuity or yearly sum of three hundred dollars, to be paid to her mother for her use in half yearly payments in advance of one hundred and fifty dollars each, until the said Marianne shall have attained the age of twenty-one years, when the said annuity shall cease, and the said Marianne will receive the five hundred dollars given to her and other indented persons, according to clause XVI. of this will:

6. I give and bequeath to my late house-keeper, Mary Kenton, an annuity or yearly sum of three hundred dollars to be paid in half yearly payments in advance of one hundred and fifty dollars each during her life.

7. I give and bequeath to Mrs. Deborah Scott, sister of Mary Kenton, and wife of Mr. Edwin T. Scott, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

8. I give and bequeath to Mrs. Catherine McLaren, sister of Mary Kenton, and wife of Mr. M. McLaren, an annuity or yearly sum of three hundred dollars, to be paid in half yearly payments in advance of one hundred and fifty dollars each, during her life.

9. I give and bequeath to Mrs. Amelia G. Taylor, wife of Mr. Richd M. Taylor, an annuity or yearly sum of three hundred dollars to be paid in half yearly payments in advance of one hundred and fifty dollars each during her life.

XIX. All that part of my real and personal estate, near Washita, in the state of Louisiana, the said real estate consisting of upwards of two hundred and eight thousand arpens or acres of land, and including therein the settlement hereinafter mentioned, I give, devise, and bequeath, as follows, namely: 1. I give devise and bequeath to the corporation of the City of New Orleans, their successors and assigns, all that part of my real estate, constituting the

settlement formed on my behalf by my particular friend Judge Henry Bree, of Washita, consisting of upwards of one thousand arpens or acres land with the appurtenances and improvements thereon, and also all the personal estate thereto belonging and thereon remaining, including upwards of thirty slaves now on said settlement and their encrease, in trust, however, and subject to the following reservations: I desire, that no part of the said estate or property, or the slaves thereon, or their encrease, shall be disposed of or sold for the term of twenty years from and after my decease, should the said judge Henry Bree survive me and live so long, but that the said settlement shall be kept up by the said judge Henry Bree, for and during said term of twenty years, as if it was his own, that is, it shall remain under his sole care and control, he shall improve the same by raising such produce as he may deem most advisable, and, after paying taxes and all expenses in keeping up the settlement by clothing the slaves and otherwise, he shall have and enjoy for his own use all the nett profits of said settlement—provided however and I desire that the said judge Henry Bree shall render annually to the corporation of the City of New Orleans, a report of the state of the settlement, the income and expenditure thereof, the number and encrease of the slaves, and the nett result of the whole. I desire that, at the expiration of the said term of twenty years, or on the decease of the said Judge Henry Bree, should he not live so long, the land and improvement forming said settlement, the slaves thereon or thereto belonging, and all other appurtenant personal property, shall be sold, as soon as the said Corporation shall deem it advisable to do so, and the proceeds of the said sale or sales shall be applied by the said corporation to such uses and purposes as they shall consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans: But, until the said sale shall be made, the said corporation shall pay all taxes, prevent waste or intrusion, and so manage the said settle-

ment and the slaves and their encrease thereon, as to derive an income, and the said income shall be applied from time to time, to the same uses and purposes for the health and general prosperity of the said inhabitants. 2. I give devise and bequeath to the Mayor Aldermen and citizens of Philadelphia, their successors and assigns, two undivided third parts of all the rest and residue of my said real estate, being the lands unimproved near Washita in the said state of Louisiana, in trust, that, in common with the corporation of the city of New Orleans, they shall pay the taxes on the said lands, and preserve them from waste or intrusion, for the term of ten years from and after my decease, and, at the end of the said term, when they shall deem it advisable to do so, shall sell and dispose of their interest in said lands gradually from time to time, and apply the proceeds of such sales to the same uses and purposes hereinafter declared and directed of and concerning the residue of my personal estate. 3. And I give devise and bequeath to the Corporation of the city of New Orleans, their successors and assigns, the remaining one undivided third part of the said lands, in trust, in common with the Mayor Aldermen and citizens of Philadelphia, to pay the taxes on the said lands and preserve them from waste and intrusion for the term of ten years from and after my decease, and, at the end of the said term when they shall deem it advisable to do so, to sell and dispose of their interest in said lands gradually from time to time, and to apply the proceeds of such sales to such uses and purposes as the said corporation may consider most likely to promote the health and general prosperity of the inhabitants of the City of New Orleans.

XX. And whereas I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations, to which, through poverty and ignorance they are exposed; and I am particularly desirous to provide for

such a number of poor male white orphan children, as can be trained in one institution, a better education as well as a more comfortable maintenance than they usually receive from the application of the public funds: And whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighborhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, I do give devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind and wheresoever situate (the real estate in Pennsylvania charged as aforesaid) unto "The Mayor, Aldermen and citizens of Philadelphia their successors and assigns in trust to and for the several uses intents and purposes hereinafter mentioned and declared of and concerning the same, that is to say: So far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said The Mayor Aldermen and citizens of Philadelphia or their successors, but the same shall forever thereafter be let from time to time to good tenants, at yearly or other rents and upon leases in possession not exceeding five years from the commencement thereof, and that the rents issues and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and Liberties of Philadelphia constantly in good repair (parts elsewhere situate to be kept in repair by the tenants thereof respectively) and towards improving the same whenever necessary by erecting new buildings, and that the net residue (after paying the several annuities herein before provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate: And so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Burmley, in trust to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of

such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate.

XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary—in erecting as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets and Eleventh and Twelfth streets in the city of Philadelphia (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, forever) a permanent College, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established; and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all other things needful to carry into effect my general design. The said College shall be constructed with the most durable materials and in the most permanent manner, avoiding needless ornament, and attending chiefly to the strength, convenience and neatness of the whole: It shall be at least one hundred and ten feet east and west, and one hundred and sixty feet north and south, and shall be built on lines parallel with High and Chestnut streets and Eleventh and Twelfth streets, provided those lines shall constitute at their junction right angles: It shall be three stories in height, each story at least fifteen feet high in the clear from the floor to the cornice: It shall be fire-proof inside and outside, the floors and the roof to be formed of solid materials, on arches turned on proper centres, so that no wood may be used, except for doors, windows and shutters: Cellars shall be made under the whole building, solely for the purposes of the institution; the doors to them from the outside shall be on the east and west of the building, and access to them from the inside shall be had by steps, descending to the cellar floor from each

of the entries or halls hereinafter mentioned, and the inside cellar doors to open under the stairs on the north-east and north-west corners of the northern entry, and under the stairs on the south-east and south-west corners of the southern entry; there should be a cellar window under and in a line with each window in the first story—they should be built one half below, the other half above, the surface of the ground, and the ground outside each window should be supported by stout walls; the sashes should open inside, on hinges, like doors, and there should be strong iron bars outside each window; the windows inside and outside should not be less than four feet wide in the clear: There shall be in each story, four rooms, each room not less than fifty feet square in the clear; the four rooms on each floor to occupy the whole space east and west on such floor or story, and the middle of the building north and south; so that in the north of the building, and in the south thereof, there may remain a space, of equal dimensions, for an entry or hall in each, for stairs and landings: In the north-east and in the north-west corners of the northern entry or hall on the first floor, stairs shall be made so as to form a double staircase, which shall be carried up through the several stories; and, in like manner, in the south-east and south-west corners of the southern entry or hall, stairs shall be made, on the first floor, so as to form a double stair-case, to be carried up through the several stories; the steps of the stairs to be made of smooth white marble with plain square edges, each step not to exceed nine inches in the rise, nor to be less than ten inches in the tread: the outside and inside foundation walls shall be at least ten feet high in the clear from the ground to the ceiling: the first floor shall be at least three feet above the level of the ground around the building, after that ground shall have been so regulated as that there shall be a gradual descent from the centre to the sides of the square formed by High and Chestnut, and Eleventh and Twelfth streets: all the outside foundation walls, forming the cellars, shall be three feet and six inches

thick up to the first floor, or as high as may be necessary to fix the centres for the first floor; and the inside foundation wall, running north and south, and the three inside foundation walls running east and west, (intended to receive the interior walls for the four rooms each not less than fifty feet square in the clear, above mentioned) shall be three feet thick up to the first floor, or as high as may be necessary to fix the centres for the first floor: when carried so far up, the outside walls shall be reduced to two feet in thickness, leaving a recess outside of one foot and inside six inches—and when carried so far up, the inside foundation walls shall also be reduced, six inches on each side, to the thickness of two feet; centres shall then be fixed on the various recesses of six inches throughout, left for the purpose, the proper arches shall be turned, and the first floor laid: the outside and the inside walls shall then be carried up of the thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the second floor, that is the floor for the four rooms each not less than fifty feet square in the clear, and for the landing in the north, and the landing in the south, of the building, where the stairs are to go up—at this stage of the work, a chain, composed of bars of inch square iron, each bar about ten feet long, and linked together by hooks formed of the ends of the bars, shall be laid straitly and horizontally along the several walls, and shall be as tightly as possible worked into the centre of them throughout, and shall be secured wherever necessary, especially at all the angles, by iron clamps solidly fastened, so as to prevent cracking or swerving in any part; centres shall then be laid, the proper arches turned for the second floor and landings, and the second floor and landings shall be laid: the outside and the inside walls shall then be carried up of the same thickness of two feet throughout as high as may be necessary to begin the recess intended to fix the centres for the third floor and landings; and, when so far carried up, another chain similar in all respects to

that used at the second story, shall be in like manner worked into the walls throughout as tightly as possible, and clamped in the same way with equal care; centres shall be formed, the proper arches turned, and the third floor landings shall be laid: the outside and the inside walls shall then be carried up, of the same thickness of two feet throughout, as high as may be necessary to begin the recess intended to fix the centres for the roof; and, when so carried up, a third chain, in all respects like those used at the second and third stories, shall in the manner before described be worked as tightly as possible into the walls throughout, and shall be clamped with equal care; centres shall now be fixed in the manner best adapted for the roof, which is to form the ceiling for the third story, the proper arches shall be turned, and the roof shall be laid as nearly horizontally as may be, consistently with the easy passage of water to the eaves: the outside walls, still of the thickness of two feet throughout, shall then be carried up about two feet above the level of the platform, and shall have marble capping, with a strong and neat iron railing thereon: The outside walls shall be faced with slabs or blocks of marble or granite, not less than two feet thick, and fastened together with clamps securely sunk therein—they shall be carried up flush from the recess of one foot formed at the first floor where the foundation outside wall is reduced to two feet: The floors and landings as well as the roof shall be covered with marble slabs, securely laid in mortar; the slabs on the roof to be twice as thick as those on the floors. In constructing the walls, as well as in turning the arches, and laying the floors, landings, and roof, good and strong mortar, and grout, shall be used, so that no cavity whatever may any where remain. A furnace or furnaces for the generation of heated air shall be placed in the cellar, and the heated air shall be introduced in adequate quantity wherever wanted by means of pipes and flues inserted and made for the purpose in the walls, and as those walls shall be constructed. In case it shall be found expedient, for

the purposes of a library or otherwise, to encrease the number of rooms by dividing any of those directed to be not less than fifty feet square in the clear, into parts, the partition walls to be of solid materials. A room most suitable for the purpose, shall be set apart for the reception and preservation of my books and papers, and I direct that they shall be placed there by my executors and carefully preserved therein. There shall be two principal doors of entrance into the college, one into the entry or hall on the first floor in the north of the building, and in the centre between the east and west walls, the other into the entry or hall in the south of the building, and in the centre between the east and west walls; the dimensions to be determined by a due regard to the size of the entire building, to that of the entry, and to the purposes of the doors. The necessity for, as well as the position and size of other doors, internal or external, and also the position and size of the windows, to be, in like manner, decided on by a consideration of the uses to which the building is to be applied, the size of the building itself and of the several rooms and of the advantages of light and air: there should in each instance be double doors, those openings into the rooms to be what are termed glass doors, so as to encrease the quantity of light for each room, and those opening outward to be of substantial wood work well lined and secured: the windows of the second and third stories I recommend to be made in the style of those in the first and second stories of my present dwelling house North Water street, on the eastern front thereof; and outside each window I recommend that a substantial and neat iron balcony be placed sufficiently wide to admit the opening of the shutters against the walls; the windows of the lower story to be in the same style, except that they are not to descend to the floor, but so far as the surbase, up to which the wall is to be carried, as is the case in the lower story of my house at my place in Passyunk township. In minute particulars, not here noticed, utility and good taste should determine. There should be

at least four out-buildings, detached from the main edifice and from each other, and in such positions as shall at once answer the purposes of the institution, and be consistent with the symmetry of the whole establishment:—each building should be, as far as practicable, devoted to a distinct purpose: in that one or more of those buildings, in which they may be most useful, I direct my executors to place my plate and furniture of every sort. The entire square, formed by High and Chestnut streets, and Eleventh and Twelfth streets, shall be enclosed with a solid wall, at least fourteen inches thick and ten feet high, capped with marble and guarded with irons on the top so as to prevent persons from getting over: there shall be two places of entrance into the square, one in the centre of the wall facing High street, and the other in the centre of the wall facing Chestnut street: at each place of entrance there shall be two gates, one opening inward and the other outward; those opening inward to be of iron and in the style of the gates north and south of my banking house, and those opening outward to be of substantial wood work well lined and secured on the faces thereof with sheet iron. The messuages now erected on the south-east corner of High and Twelfth streets, and on Twelfth street, to be taken down and removed, as soon as the College and out-buildings shall have been erected, so that the establishment may be rendered secure and private.

When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture, and books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution; the income issues and profits of so much of the said sum of two millions of dollars as shall remain unexpended shall be applied to maintain the said college according to my directions:

1. The institution shall be organized as soon as practicable, and, to accomplish that purpose more effectually, due public notice of the intended opening of the college

shall be given—so that there may be an opportunity to make selections of competent instructors, and other agents, and those who may have the charge of orphans may be aware of the provision intended for them:

2. A competent number of instructors, teachers, assistants and other necessary agents, shall be selected, and when needful their places from time to time supplied; they shall receive adequate compensation for their services: but no person shall be employed, who shall not be of tried skill in his or her proper department, of established moral character—and in all cases persons shall be chosen on account of their merit, and not through favor or intrigue.

3. As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced.

4. On the application for admission, an accurate statement should be taken, in a book prepared for the purpose, of the name, birthplace, age, health, condition as to relatives, and other particulars, useful to be known, of each orphan.

5. No orphan should be admitted until the guardians or directors of the poor, or a proper guardian, or other competent authority, shall have given, by indenture, relinquishment, or otherwise, adequate power to the Mayor, Aldermen and citizens of Philadelphia, or to directors or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with or withdrawing such orphan from the institution.

6. Those orphans, for whose admission application shall first be made, shall be first introduced, all other things concurring—and at all future times priority of application

shall entitle the applicant to preference in admission, all other things concurring: but, if there shall be at any time more applicants than vacancies, and the applying orphans shall have been born in different places, a preference shall be given,—first to orphans born in the city of Philadelphia; secondly, to those born in any other part of Pennsylvania; thirdly to those born in the city of New York (that being the first port on the continent of North America, at which I arrived); and lastly, to those born in the city of New Orleans, being the first port on the said continent at which I first traded, in the first instance as first officer, and subsequently as master and part owner of a vessel and cargo.

7. The orphans, admitted into the College, shall be there fed with plain but wholesome food, clothed with plain but decent apparel (no distinctive dress ever to be worn) and lodged in a plain but safe manner: Due regard shall be paid to their health, and to this end their persons and clothes shall be kept clean, and they shall have suitable and rational exercise and recreation: They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages (I do not forbid, but I do not recommend, the Greek and Latin Languages)—and such other learning and science, as the capacities of the several scholars may merit or warrant: I would have them taught facts and things, rather than words or signs: And, especially, I desire, that by every proper means a pure attachment to our republican institutions, and to the sacred rights of conscience, as guaranteed by our happy constitutions, shall be formed and fostered in the minds of the scholars.

8. Should it unfortunately happen, that any of the orphans, admitted into the college, shall, from malconduct, have become unfit companions for the rest, and mild means

of reformation prove abortive, they should no longer remain therein.

9. Those scholars, who shall merit it, shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age; they shall then be bound out by the Mayor Aldermen and citizens of Philadelphia, or under their direction, to suitable occupations, as those of agriculture, navigation, arts, mechanical trades, and manufactures, according to the capacities and acquirements of the scholars respectively; consulting, as far as prudence shall justify it, the inclinations of the several scholars, as to the occupation, art, or trade, to be learned.

In relation to the organization of the college and its appendages, I leave, necessarily, many details to the Mayor Aldermen and citizens of Philadelphia and their successors; and I do so, with the more confidence, as, from the nature of my bequests and the benefit to result from them, I trust that my fellow citizens of Philadelphia, will observe and evince especial care and anxiety in selecting members for their City Councils, and other agents: There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: first, I enjoin and require, that, if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but, in no event, shall any part of the said capital be sold, disposed of, or pledged, to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof exclusively: secondly, I enjoin and require, that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty what-

ever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college:—

. . . In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitements, which clashing doctrines and sectarian controversy are so apt to produce; My desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.

. . . If the income, arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the college and out-buildings, shall, owing to the encrease of the number of orphans, applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund hereinafter expressly referred to for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill navigation company—my design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.

XXII. And as to the further sum of five hundred thousand dollars, part of the residue of my personal estate, in trust, to invest the same securely, and to keep the same so invested, and to apply the income thereof exclusively to the following purposes, that is to say:

1. To lay out, regulate, curb, light and pave a passage or street, on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue, extending from South or Cedar street, all along the east part of Water street squares, and the west side of the logs, which form the heads of the docks, or thereabouts; and to this intent to obtain such acts of Assembly, and to make purchases or agreements, as will enable the Mayor Aldermen and citizens of Philadelphia to remove or pull down all the buildings, fences and obstructions, which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue;—to fill up the heads of such of the docks as may not afford sufficient room for the said street;—to compel the owners of wharves to keep them clean and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon after a shower of rain,—to completely clean and keep clean all the docks within the limits of the city, fronting on the Delaware;—and to pull down all platforms carried out, from the east part of the city over the river Delaware, on piles or pillars.

2. To pull down and remove all wooden buildings, (as well those made of wood and other combustible materials, as those called brick-paned or frame buildings filled in with bricks) that are erected within the limits of the City of Philadelphia—and also to prohibit the erection of any such buildings within the said city's limits at any future time.

3. To regulate, widen, pave, and curb Water street, and to distribute the Schuylkill water therein upon the fol-

lowing plan that is to say, . . . that Water street be widened east and west from Vine street all the way to South street, in like manner as it is from the front of my dwelling to the front of my stores on the west side of Water street, and the regulation of the curbstones continued at the same distance from one another, as they are at present opposite to the said dwelling and stores, so that the regulation of the said street be not less than thirty-nine feet wide, and afford a large and convenient foot-way, clear of obstructions and incumbrances of every nature, and the cellar doors on which, if any shall be permitted, not to extend from the buildings on to the foot-way more than four feet; the said width to be encreased gradually, as the fund shall permit, and as the capacity to remove impediments shall encrease, until there shall be a correct and permanent regulation of Water street on the principles above stated, so that it may run north and south as strait as possible: That the ten feet middle alleys, belonging to the public, and running from the centre of the east squares to Front street, all the way down across Water street to the river Delaware, be kept open and cleansed as city property, all the way from Vine to South street—that such part of each centre or middle alley as runs from Front to Water street be arched over with bricks or stone, in so strong a manner as to facilitate the building of plain and permanent stone steps and plat-forms, so that they may be washed and kept constantly clean: and that the continuance of the said alleys, from the east side of Water street be curbed all the way to the river Delaware and kept open forever—. . . (I understand that those middle or centre alleys were left open in the first plan of the lots, on the east front of the city, which were granted from the east side of Front street to the river Delaware, and that each lot on said east front has contributed to make those alleys by giving a part of their ground in proportion to the size of each lot; those alleys were in the first instance, and still are, considered public property, intended for the convenience of the in-

habitants residing in Front street to go down to the river for water and other purposes; but, owing to neglect or to some other cause, on the part of those, who have had the care of city property, several encroachments have been made on them by individuals, by wholly occupying, or building over, them, or otherwise, and in that way the inhabitants, more particularly those who reside in the neighborhood, are deprived of the benefit of that wholesome air, which their opening and cleansing throughout would afford): That the iron pipes, in Water street, which, by being of smaller size than those in the other streets, and too near the surface of the ground, cause constant leaks, particularly in the winter season, which in many places render the street impassable, be taken up and replaced by pipes of the same size quality and dimensions in every respect, and laid down as deeply from the surface of the ground, as the iron pipes, which are laid in the main streets of the City: . . . and as it respects pumps for Schuylkill water and fire-plugs in Water street, that one of each be fixed at the south-west corner of Vine and Water streets, and so running southward, one of each near the steps of the centre alley going up to Front street; one of each at the south-west corner of Sassafras and Water streets, one of each near the steps of the centre alley going up to Front street, and so on at every south-west corner of all the main streets and Water street, and of the centre alleys of every square, as far as South or Cedar street; and when the same shall have been completed, that all Water street shall be repaved by the best workmen in the most complete manner, with the best paving water-stones, after the height of the curbstones shall have been regulated throughout, as well as the ascent and descent of the street, in such manner as to conduct the Water through the main streets and the centre alleys to the river Delaware, as far as practicable; and whenever any part of the street shall want to be raised, to use nothing but good paving gravel for that

purpose, so as to make the paving as permanent as possible: . . . By all which improvements, it is my intention to place and maintain the section of the city above referred to in a condition which will correspond better with the general cleanness and appearance of the whole city, and be more consistent with the safety, health, and comfort of the citizens. And my mind and will are, that all the income, interest and dividends of the said capital sum of five hundred thousand dollars shall be yearly and every year expended upon the said objects, in the order in which I have stated them as closely as possible, and upon no other objects until those enumerated shall have been attained: and, when those objects shall have been accomplished, I authorize and direct the said The Mayor Aldermen and Citizens to apply such part of the income of said capital sum of five hundred thousand dollars as they may think proper to the further improvement, from time to time, of the eastern or Delaware front of the City.

XXIII. I give and bequeath to the Commonwealth of Pennsylvania, the sum of three hundred thousand dollars, for the purposes of internal improvement by canal navigation, to be paid into the state treasury by my executors, as soon as such laws shall have been enacted by the constituted authorities of the said commonwealth as shall be necessary, and amply sufficient to carry into effect, or to enable the constituted authorities of the city of Philadelphia to carry into effect, the several improvements above specified; namely, 1. laws, to cause Delaware avenue, as above described, to be made, paved, curbed, and lighted; to cause the buildings, fences, and other obstructions now existing to be abated and removed; and to prohibit the erection of any such obstructions to the eastward of said Delaware avenue; 2. laws, to cause all wooden buildings as above described to be removed, and to prohibit their future erection within the limits of the city of Philadelphia; 3. laws, providing for the gradual widening, regulating, paving, and

curbing of Water street, as hereinbefore described, and also for the repairing the middle alleys, and introducing the Schuylkill water, and pumps, as before specified—all which objects, may, I persuade myself, be accomplished on principles at once just into relation to individuals, and highly beneficial to the public: the said sum, however, not to be paid, unless said laws be passed within one year after my decease.

XXIV. And as it regards the remainder of said residue of my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interest and income thereof from time to time, so that the whole shall form a permanent fund; and to apply the income of the said fund:—

1. To the further improvement and maintenance of the aforesaid College as, directed in the last paragraph of the XXIst clause of this will.

2. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen really suited to the purpose; and to this end, I recommend a division of the city, into watch districts or four parts, each under a proper head, and that at least two watchmen shall in each round or station patrol together.

3. To enable the said corporation to improve the city property, and the general appearance of the city itself; and, in effect to diminish the burden of taxation, now most oppressive especially on those, who are the least able to bear it:

To all which objects, the prosperity of the City, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and every year for ever—after providing

for the College as hereinbefore directed, as my primary object. But, if the said city shall knowingly and wilfully violate any of the conditions hereinabove and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation, excepting however, the rents issues and profits of my real estate in the City and County of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid College, in the manner specified in the last paragraph of the XXIst clause of this will: And, if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall for the term of one year, from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give devise and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the College as aforesaid) to the United States of America for the purposes of internal navigation and no other.

Provided, nevertheless, and I do hereby declare, that all the preceding bequests and devises of the residue of my estate to The Mayor, Aldermen and Citizens of Philadelphia, are made upon the following express conditions, that is to say—First, that none of the monies, principal, interest, dividends, or rents, arising from the said residuary devise and bequest, shall at any time be applied to any other purpose or purposes whatever than those herein mentioned and appointed:—Second, that separate accounts, distinct from the other accounts of the corporation, shall be kept by the said corporation, concerning the said devise, bequest, college and funds, and of the investment and application thereof; and that a separate account or accounts of the same shall be kept in bank, not blended with any other account, so that it may at all times appear on examination by a committee of the legislature as hereinafter mentioned,

that my intentions had been fully complied with:—Third, that the said corporation render a detailed account annually in duplicate to the legislature of the Commonwealth of Pennsylvania, at the commencement of the session, one copy for the senate and the other for the house of representatives, concerning the said devised and bequeathed estate, and the investment and application of the same, and also a report in like manner of the state of the said College, and shall submit all their books papers and accounts touching the same, to a committee or committees of the legislature for examination, when the same shall be required: Fourth, the said corporation shall also cause to be published in the month of January annually, in two or more newspapers printed in the city of Philadelphia, a concise but plain account of the state of the trusts, devises, and bequests herein declared and made, comprehending the condition of the said college, the number of scholars, and other particulars needful to be publicly known, for the year next preceding the said month of January, annually.

XXV. And whereas I have executed an assignment in trust of my banking establishment, to take effect the day before my decease, to the intent that all the concerns thereof may be closed by themselves, without being blended with the concerns of my general estate, and the balance remaining to be paid over to my executors: Now, I do hereby direct my executors, hereinafter mentioned, not to interfere with the said trust in any way except to see that the same is faithfully executed, and to aid the execution thereof by all such acts and deeds as may be necessary and expedient to effectuate the same, so that it may be speedily closed, and the balance paid over to my executors, to go, as in my will, into the residue of my estate: And I do hereby authorise direct and empower the said trustees from time to time, as the capital of the said bank shall be received, and shall not be wanted for the discharge of the debts due thereat, to

invest the same in good securities in the names of my executors, and to hand over the same to them, to be disposed of according to this my will.

XXVI. Lastly—I do hereby nominate and appoint Timothy Paxson, Thomas P. Cope, Joseph Roberts, William J. Duane, and John A. Barclay . . . executors of this my last will and testament: I recommend to them to close the concerns of my estate as expeditiously as possible, and to see that my intentions in respect to the residue of my estate are and shall be strictly complied with; and I do hereby revoke all other wills by me heretofore made.

In witness, I, the said Stephen Girard have to this my last will and testament, contained in thirty-five pages, set my hand at the bottom of each page, and my hand and seal at the bottom of this page; the said will executed, from motives of prudence, in duplicate, this sixteenth day of February, in the year one thousand eight hundred and thirty.

STEPHEN GIRARD. (SEAL)

Signed, sealed, published, and declared by the said Stephen Girard, as and for his last will and testament, in the presence of us, who have at his request hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, February 16, 1830.

JOHN H. IRWIN,
SAML. ARTHUR,
S. H. CARPENTER.

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of

real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will, now I do hereby republish the foregoing last will and testament dated February 16, 1830, and do confirm the same in all particulars: In witness, I the said Stephen Girard set my hand and seal hereunto the twenty-fifth day of December eighteen hundred and thirty.

STEPHEN GIRARD. (SEAL)

Signed sealed and published and declared by the said Stephen Girard as and for a re-publication of his last will and testament in the presence of us, who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, Deer 25, 1830.

JOHN H. IRWIN,
SAML. ARTHUR,
JNO. THOMSON.

CODICIL

Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have, since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will; and whereas, in particular, I have recently purchased from Mr. William Parker the mansion house, out-buildings, and forty-five acres and some perches of land, called Peel-Hall, on the Ridge Road in Penn Township, now I declare it to be my intention and I direct that the Orphan establishment, provided for in my said will, instead of being built as therein directed upon my square of ground between High

and Chestnut and Eleventh and Twelfth streets in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose exclusively in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said Orphan Establishment prescribed by my said will as to said square shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently the said square of ground is to constitute and I declare it to be a part of the residue and remainder of my real and personal estate and given and devised for the same uses and purposes as are declared in section XX. of my will, it being my intention, that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said XXth section: In witness whereof I, the said Stephen Girard set my hand and seal hereunto the twentieth day of June eighteen hundred and thirty-one.

STEPHEN GIRARD. (SEAL)

Signed sealed published and declared by the said Stephen Girard as and for a re-publication of his last will and testament and a further direction in relation to the real estate therein mentioned, in the presence of us who at his request have hereunto subscribed our names as witnesses thereto in the presence of the said testator and of each other, June 20, 1831.

S. H. CARPENTER.

L. BARDIN,

SAML. ARTHUR,

Philadelphia, December 31, 1831. Then personally appeared Saml. Arthur and S. H. Carpenter two of the Witnesses to the foregoing Will and the second Codicil or republication thereof and on their Oaths did say that they were present and did see and hear Stephen Girard the

Testator in the said Will and second republication thereof, named, sign seal publish and declare the same as & for his last Will and Testament and republication thereof and that at the doing thereof he was of sound mind memory and understanding to the best of their knowledge and belief—And at the same time appeared Jno. Thomson, one of the Witnesses to the first republication of said will, and on his solemn affirmation did say that he was present, and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament and the said Samuel Arthur, another of the witnesses to said republication of said will on his oath did further say that he was present and did see and hear Stephen Girard the Testator in the first republication of said Will named sign seal publish and declare the same as and for a republication of his last Will and Testament, and they both did say that at the doing thereof he was of sound mind, memory and understanding, to the best of their knowledge and belief.

CORAM,

J. HUMES,

Register.

December 31, 1831. Timothy Paxson and Thomas P. Cope, two of the Executors, affirmed—and Joseph Roberts, William J. Duane, and John A. Barclay the other Executors sworn and Letters Testamentary were granted unto them.

APPENDIX B.

**Pennsylvania Act of March 11, 1789, 2 Smith Laws 462, § 2,
53 Purdon's Stat. § 6362.**

Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the Commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same, That the inhabitants of the city of Philadelphia, as the same extends and is laid out between the rivers Delaware and Schuylkill, be, and they, and their successors for ever, are hereby constituted a corporation and body politic, in fact and in law, by the name and style of "The Mayor, Aldermen and Citizens of Philadelphia", and by the same name shall have perpetual succession; and they and their successors shall, at all times forever, be able and capable in law to have, purchase, take, receive, possess and enjoy lands, tenements and hereditaments, liberties, franchises and jurisdictions, goods, chattels and effects to them and their successors forever, or for any other or less estate; and the same lands, tenements and hereditaments, goods, chattels and effects, to grant, bargain, sell, alien and convey, mortgage, pledge, charge and encumber, or demise and dispose of, at their will and pleasure.

APPENDIX C.

Pennsylvania Act of March 24, 1832, P. L. 176 (1831-1832 Volume), 53 Purdon's Stat. § 7411, § 7433, § 6791.

AN ACT

To enable the Mayor, Aldermen, and citizens of Philadelphia to carry into effect certain improvements, and execute certain trusts.

WHEREAS, By the last will and testament of Stephen Girard, late of the city of Philadelphia, deceased, the sum of five hundred thousand dollars is bequeathed to the mayor, aldermen, and citizens of Philadelphia, in trust among other things, to apply the income thereof "first, to lay out, regulate, curb, light and pave a passage or street on the east part of the city of Philadelphia, fronting the river Delaware, not less than twenty-one feet wide, and to be called Delaware Avenue, extending from South or Cedar Street, all along the east part of Water street squares, and the west side of the logs which form the heads of the docks, or thereabouts; and to this intent, to obtain such acts of assembly, and to make such purchases or agreements as will enable the mayor, aldermen, and citizens of Philadelphia to remove or pull down all the buildings, fences, and obstructions which may be in the way, and to prohibit all buildings, fences, or erections of any kind to the eastward of said avenue, to fill up the heads of such of the docks as may not afford sufficient room for the said street, to compel the owners of wharves to keep them clean, and covered completely with gravel or other hard materials, and to be so levelled that water will not remain thereon, after a shower of rain, to completely clean, and keep clean, all the docks within the limits of the city, fronting on the Delaware; and to pull down all platforms carried out from the east part of the city, over the river Delaware, on piles or

pillars." "Second, To pull down and remove all wooden buildings, as well as those made of wood and other combustible materials as those called brick-paned, or framed buildings, filled in with bricks, that are erected within the limits of the city of Philadelphia; and also to prohibit the erection of any such building within the said city's limits at any future time." "Third, to widen, pave, and curb Water street, and to distribute the Schuylkill water therein, upon" a certain plan therein set forth. Now, for the purpose of enabling the mayor, aldermen, and citizens of Philadelphia aforesaid, to effect the improvements contemplated by the said testator, and to execute in all other respects the trusts created by his will, to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephen Girard has desired the legislature to enact the necessary laws.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That it shall and may be lawful for the mayor, aldermen and citizens of Philadelphia, by ordinance lawfully enacted, or the intervention and act of authorized officers or agents, to lay out, regulate, curb, light, and pave a passage or street, not less than twenty-one feet in width, on the east part of the city of Philadelphia, fronting the river Delaware, at such distance or distances in the several parts thereof from the eastern line of Water street as they shall judge proper, extending from Vine to Cedar street, to be called the Delaware Avenue; and that, having laid out such street, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

SECT. 2. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, in manner aforesaid,

to lay out Water street, in the said city, anew; in such manner as that the same shall be as nearly straight as conveniently may be, and of a uniform, or as near as may be uniform width throughout, not less than thirty-nine feet, if practicable; and the same to open and keep open for ever, as a common and public highway; and that having laid out said Water street of such increased width, they shall cause a record of the same to be made in the court of Quarter Sessions for the county of Philadelphia.

SECT. 3. *And be it further enacted by the authority aforesaid,* That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, or take other measures for regulating, adjusting, and determining the easternmost line to which wharves may thereafter lawfully be constructed on the river Delaware, fronting said city, and to cause a record of such regulated line to be made in the court of Quarter Sessions for the county of Philadelphia; to fix and decide on, or cause their officers to fix and decide on the levels of all wharves fronting the said city, and to declare the regulation thereof; to require the owners thereof to pave the same or to lay them with gravel, according to such regulation, so as effectually to drain and pass off the water from the same, and to require all persons owning and occupying or using docks or wharves, to cleanse the same and to keep the same in repair, and to prescribe the form, materials, and character of workmanship of all wharves hereafter to be constructed, and to require all platforms now projecting into the river Delaware, and supported on piles, pillars or piers, to be removed, and to prohibit the construction, in future, of any such projecting platforms; and to require the removal, and prohibit the construction, in future, of all buildings, fences, and other obstructions, to the eastward of Delaware Avenue, above mentioned, and to declare all erections and constructions whatsoever, contrary to the said ordinances, whether erected before or after the passage of the same to

be nuisances; and generally to devise, ordain and execute whatever other things shall by them, the said mayor, aldermen, and citizens of Philadelphia aforesaid, be deemed necessary or convenient for the good arrangement, security and government of the said wharves: *Provided*, That the easternmost line of the said wharves shall not be held to be finally determined, and the record thereof shall not be made, as aforesaid, unless the board of wardens, of the port of Philadelphia, shall decide and make their certificate in writing, that such easternmost line is not inconsistent with the public interests, which certificate shall also be recorded in the said court of Quarter Sessions; but if the said certificate shall not be granted by them, within three months after application made therefor, the refusal or omission of the said board of wardens to grant such certificate, shall, when duly verified by affidavit, be esteemed the judgment and decision of the said board of wardens, that such easternmost line is inconsistent with the public interests, and in case such a decision shall in any wise be made, an appeal shall lie therefrom to the said court of Quarter Sessions, as in other cases, and the judgment of the said court, in favor of such regulated line, shall be, for all purposes, equivalent to a similar decision by the said board of wardens: *Provided* That, nothing herein contained shall be construed to give authority to any one to erect wharves, or piers, extending out as far as the said regulated easternmost line, without license from the said board of wardens, as heretofore.

SECT. 4. *And be it further enacted by the authority aforesaid*, That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to pass ordinances, prohibiting the construction within the said city, or any parts thereof, of all framed or brick-paned or other buildings, the walls whereof are not wholly composed of incombustible materials, determining the thicknesses of which walls of buildings of different dimensions and character

shall hereafter be made in the said city, and in making all such other legal provisions as they shall think expedient for preventing the extension of injuries from fire, in the said city, and to declare all buildings, the walls whereof are not wholly composed of incombustible materials, to be nuisances.

SECT. 5. *And be it further enacted by the authority aforesaid,* That when any of the said ordinances shall have been passed, or other proceedings had in relation to the said Delaware Avenue and Water street, or either of them, and the record thereof shall have been made as aforesaid, it shall be lawful for the mayor, aldermen, and citizens of Philadelphia aforesaid, to proceed, from time to time, to open for public use, any part or parts thereof, and the same to keep open as common and public highways forever; and to that end, to enter upon such property as may be found to be within the same, construct wharves extending into the river, within the lines of said Delaware Avenue, and to a reasonable distance beyond the same, and fill up all docks within the limits thereof, and remove all obstructions, of whatever kind, from within the limits of said avenue and street, or any parts thereof, and level, drain, pitch, and pave the same, as other streets in the said city. And from and after the passing of such ordinances, and the record of the said avenue and street, all buildings, thereafter erected or rebuilt on the said avenue and street shall conform to the recorded limits of the same, and the mayor, aldermen and citizens of Philadelphia aforesaid, may pass ordinances, declaring all obstructions within the same to be nuisances.

SECT. 6. *And be it further enacted by the authority aforesaid,* That it shall at all times be lawful for the mayor, aldermen and citizens of Philadelphia, aforesaid, to remove and abate any building, erection or obstruction whatever, which, by this act, or by any ordinance to be

hereafter passed by virtue of it, may be declared a nuisance: *Provided*, That if such building, erection or obstruction shall have been in existence at the time of the passage of this act, or of such ordinance passed by virtue hereof, the mayor, aldermen and citizens aforesaid shall give at least three months notice of their intention to remove the same to the persons having the ownership, occupation or use thereof, or in case no such persons shall be known to them, then they shall affix a copy of such notice to and upon such building, erection or obstruction, three months before proceeding to remove the same.

SECT. 7. *And be it further enacted by the authority aforesaid*, That it shall be lawful for the said the mayor, alderman and citizens of Philadelphia, aforesaid, to provide for the punishment of any person or persons who shall commit any nuisance contrary to the intent and meaning of this act, and of the ordinances which may be passed by virtue thereof, and of any person or persons who having committed any such nuisance, shall, after notice, refuse or neglect to remove the same.

SECT. 8. *And be it further enacted by the authority aforesaid*, That all persons whatsoever who shall receive damage to their property by reason of any thing which shall have been done by the mayor, aldermen and citizens of Philadelphia, under this act, or any ordinances passed by virtue hereof, may, after ten days notice of such their intention, to the mayor, aldermen and citizens aforesaid, apply by petition in writing, to the court of Quarter Sessions for the county of Philadelphia, who shall thereupon appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting, given as aforesaid, and shall be sworn or affirmed to inquire what damages the petitioners, or any of them, have sustained by reason of any thing so done, considering as well the advantages which

may accrue to such petitioners as the injuries by them complained of, and the said jury having viewed the premises and heard the parties, or their counsel, shall report in writing, under the hands of at least ten jurors, and their report having been considered and confirmed by the court, the damages thereby found shall be paid by the mayor, aldermen and citizens aforesaid, in six months after the confirmation of the said report.

SECT. 9. *And be it further enacted by the authority aforesaid,* That if the mayor, aldermen, and citizens aforesaid, shall deem it expedient that the damages should be legally ascertained before proceeding to enter on premises for the purpose of removing obstructions, and before appropriating to public use any property of individuals, or otherwise injuriously affecting the rights and interests of any proprietor, the mayor, aldermen and citizens aforesaid may, from time to time apply to the court of Quarter Sessions for the county of Philadelphia, by petition, in writing, specifying therein as nearly as may be the persons and property in regard to which they desire that the damages should be ascertained, and thereupon the said court shall appoint a jury of twelve disinterested freeholders, citizens of the city of Philadelphia, which jury shall assemble, after ten days notice of their meeting given to the owners or occupiers of the property, and shall be sworn or affirmed, as is provided in the foregoing section of this act, and having viewed and heard, as is therein provided, shall report in writing, under the hands of at least ten jurors, specifying in their said report as well the causes for which damages, if any should be paid, as the amounts of such damages, and in such case the mayor, aldermen and citizens aforesaid may, within the year after the confirmation of such report by the court of Quarter Sessions, tender to any owner of property named therein, the amount of damages thereby found in his favor, or may pay the same into court, for his use and benefit, and may thereafter proceed to enter upon

the premises, and remove the obstructions, or appropriate the property for which damages shall have been so paid or tendered, first giving three months notice to the tenant in possession, if any: *Provided however*, That if the amount so found by such jury in favor of any owner, shall not be so tendered or paid within one year after the confirmation of such report, then the proceedings had upon the said petition of the mayor, aldermen, and citizens aforesaid, shall, so far as relates to the said owner, be null and void, and the mayor, alderman, and citizens aforesaid, may thereafter present their petition in writing anew, under this section, as if no proceedings had before been had: *And provided also*, That when a report shall have been made by a jury, under the provisions of this section, and damages shall have been tendered or paid, in accordance therewith, if thereafter any damage than that reported on shall be sustained, the party aggrieved may thereafter apply, in regard to such other damages, for a jury to assess the same, under the eighth section of this act: *Provided further*, That it shall at all times be competent to the mayor, aldermen, and citizens aforesaid, to agree with any owner or owners of property, so to be taken, removed, or affected for the damages thereby to be occasioned, and such agreement shall be instead of any of the proceedings detailed in this or the foregoing sections of this act: And, forasmuch as in the course of time it may appear that powers are not vested in the said the mayor, aldermen, and citizens of Philadelphia which may be yet required to the full execution of those parts of the said will of the said Stephen Girard, for the carrying of which into effect he has in his said will requested legislative provision, and it is the object and intent of this act fully to confer all such powers.

SECT. 10. *Be it further enacted by the authority aforesaid*, That it shall be lawful for the mayor, aldermen, and citizens of Philadelphia, to exercise all such jurisdiction, enact all such ordinances, and do and execute all such

acts and things whatsoever as may be necessary and convenient for the full and entire acceptance, execution and prosecution of any and all the devises and bequests, trusts and provisions contained in the said will, which are the subjects of the preceding parts of this act, and to enable the constituted authorities of the city of Philadelphia to carry which into effect, the said Stephan Girard has desired the legislature to enact the necessary laws.

SECT. 11. *And be it further enacted by the authority aforesaid,* That no road or street shall be laid out, or passed through the land in the county of Philadelphia, bequeathed by the late Stephen Girard for the erection of a college, unless the same shall be recommended by the Trustees or Directors of said college, and approved of by a majority of the select and common councils of the city of Philadelphia.